RECORD, CASE No. 13,651.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 429.

THE LEHIGH VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED SEPTEMBER 24, 1889.

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1 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Lehigh Valley Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of

2 a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-third day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Associate Justice of the Sup. Ct U. States.
August 23, 1889.

[Endorsed:] Filed in supreme court, middle district, Aug. 27, 1889,

3 The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the prothonotary of the supreme court of Pennsylvania for the middle district, wherein The Lehigh Valley Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this 23d day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court of the U. S.

[Endorsed:] Filed in supreme court, middle district, Aug. 30, 1889.

4 On this thirtieth day of August, in the year of our Lord one thousand eight hundred and eighty nine, personally appeared A. C. Stamm before me, the subscriber, deputy prothonotary of the supreme court of Pennsylvania for the middle district of said court, and makes oath that he delivered a true copy of the within citation to John F. Sanderson, deputy attorney general of the Commonwealth of Pennsylvania, upon the twenty-ninth day of August, A. D. 1889.

A. C. STAMM.

Sworn to and subscribed the day and year aforesaid.
WILLIAM PEARSON,
Per JOHN HARNER,
Deputy Prothonotary.

5 (*Appearance Docket Entry.*)

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 576, June term, 1888, is contained the following copy of appearance docket entry:

COMMONWEALTH OF PENNSYLVANIA *vs.* LEHIGH VALLEY RAILROAD CO. } Appeal from the Settlement of the Auditor General and State Treasurer.

May 28, 1888, appeal and specifications of objection filed.
June 14, 1888, bond filed.
Aug. 9, 1888, *narr.* and copy of account filed.
Oct. 13, 1888, stipulation to try without jury filed.

Dec. 3, 1888, opinion and finding of the court filed, deciding that there is due the Commonwealth by the defendant the sum of one thousand six hundred forty-five and $\frac{51}{100}$ dollars ($1,645.51) and costs.

Dec. 18, 1888, plaintiff receipt filed.

Jan. 11, 1889, exceptions on part of defendant filed.

Same day, exceptions overruled and judgment entered in accordance with opinion previously filed.

Jan'y 28, 1889, writ of error No. 24, May term, 1889, from supreme court received and filed.

Certified.

[SEAL.] W. H. ULRICH,
Prothonotary.

6 *Appeal.*

In the matter of the account for tax on gross receipts, amounting to $30,413.66, settled against the Lehigh Valley Railroad Company by the auditor general of Pennsylvania April 4, 1888, and approved by the State treasurer April 17, 1888, a copy of which account is hereunto attached.

The said Lehigh Valley Railroad Company, having paid or proposing to pay into the State treasury the sum of $11,323.26, being the tax at eight mills upon its receipts derived from transportation wholly within the State of Pennsylvania, except from transportation of U. S. mail and of express matter, hereby appeals from said settlement of account to the court of common pleas of Dauphin county, and files the following specifications of objections thereto, agreeably to the provisions of the act of assembly in such case made and provided:

1. The main line of the Lehigh Valley Railroad Company extends from Wilkes Barre, in the State of Pennsylvania, to Perth Amboy, in the State of New Jersey. The company also owns numerous branch roads, some of which are in Pennsylvania and some in New Jersey. Under agreement with other railroad companies it runs its own trains from Wilkes Barre to the city of New York, and also from Wilkes Barre to the city of Buffalo, in the State of New York, and its principal business consists of the transportation of freight and passengers to or from other States out of, into, or through the State of Pennsylvania. A large proportion of the receipts taxed in the settlement hereby appealed from was derived from freight and passengers carried by continuous transportation from points in Pennsylvania to points in other States or from points in other States to points in Pennsylvania or from points in other States to points in other States passing through the State of Pennsylvania. The taxation of freight or passengers transported by continuous lines of transportation to or from other States out of, into, or through the State of Pennsylvania or of the receipts for such transportation to or from other States out of, into, or through the State of Pennsylvania is in violation of that clause of section 8 of article I of the Constitution of the United States which provides that Congress

shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, under which said tax is claimed, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

2. The settlement of account hereby appealed from embraces tax upon $177,016.02, receipts from transportation of freight, passengers, &c., by continuous carriage upon a single way-bill or ticket, from points in Pennsylvania to other points in Pennsylvania, but passing out of the State into other States and back again into Pennsylvania in course of transportation. The taxation of receipts so derived is in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

7 3. In the settlement of account hereby appealed from tax is charged upon $84,863.08, receipts from transportation of freight, passengers, &c., by continuous carriage upon a single way-bill or ticket, from points in a foreign State to other points in the same State after passing through the State of Pennsylvania. The taxation of receipts so derived is in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

4. In the settlement of account hereby appealed from tax is charged upon $403,386.51, receipts from transportation of freight, passengers, &c., by continuous carriage upon a single way-bill or ticket, from points in other States to points in Pennsylvania. The taxation of receipts so derived is in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

5. In the account hereby appealed from tax is charged upon $2,399,913.66, receipts from transportation of freight, passengers, &c., by continuous carriage upon a single way-bill or ticket, from points in Pennsylvania to points in other States. The taxation of receipts so derived is in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to

warrant the imposition of said tax, is therefore unconstitutional and void.

6. In the account hereby appealed from tax is charged upon $149,374.38, receipts from transportation, by continuous carriage upon a single way-bill or ticket, of freight, passengers, &c., from points in a foreign State, passing through Pennsylvania, and ending in a third State. The taxation of receipts so derived is in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

7. In the account hereby appealed from tax is charged upon $71,393.15, receipts from transportation of freight, passengers, &c., by continuous carriage upon a single way-bill or ticket, from points in foreign States to other points in foreign States not touching Pennsylvania. The taxation of receipts so derived is in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

8. The settlement of account hereby appealed from includes tax upon $16,457.67, receipts from the transportation of United States mail under contracts with the Government of the United States. The taxation of receipts so derived is the taxation of an agency of the Government of the United States, and is also in conflict with that clause of section 8 of article I of the Constitution of the United States which provides that Congress shall have power "to establish post offices and post roads;" and the act of June 7, 1879, or any other act of assembly, if it shall be found to warrant the imposition of said tax, is therefore unconstitutional and void.

9. The settlement of account hereby appealed from includes tax upon $18,796.27, received by the corporation appellant from another company to which it practically leases its railroad, &c., for the purpose of carrying on the express business. The railroad company receives nothing from the shippers of express matter, their dealings being entirely with the express company, which pays to the railroad company a stipulated sum for permission to conduct said business. The express company does or is liable to pay to the Commonwealth a tax upon the entire receipts derived from the transportation of express matter, and the railroad company, under the terms of the second proviso of the seventh section of the act of June 7, 1879, is not liable for any tax upon the proportion of said receipts received by it from the express company; or if it is, then, there being double taxation upon a portion of the receipts from the transportation of express matter, the said seventh section is void because in conflict with section 1 of article IX of the constitution of Pennsyl-

vania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

10. The Lehigh Valley Railroad Company having paid or proposing to pay into the State treasury the sum of $11,323.26, being the full tax at eight mills upon its entire receipts from transportation wholly within the State of Pennsylvania, except from transportation of U. S. mail and of express matter, it is not indebted to the Commonwealth of Pennsylvania in any further sum, and the balance claimed in the settlement of account hereby appealed from is erroneously and illegally charged.

Harrisburg, Pa., May 14, 1888.

LEHIGH VALLEY RAILROAD COMPANY,
(Signed) By its attorney, M. E. OLMSTED.

Account.

Lehigh Valley Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts, per act of June 7th, 1879, for six months ending Dec. 31, 1887, as per reports herewith filed:

Gross receipts		$4,726,083 87
Proportion taxable in Penna., $\frac{27107}{35698}$		3,801,710 94
Tax at rate of eight-tenths of one per cent.		$30,413 66
Due Commonwealth		$30,413 66

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *April* 4, 1888.

Settled and entered.
(Signed) JOHN A. GLENN,
For A. WILSON NORRIS,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *April* 17, 1888.

Approved.
(Signed) W. LIVSEY,
State Treasurer.

9 AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *April* 19, 1888.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office the day and year aforesaid.
(Signed) JNO. A. GLENN,
[SEAL.] For A. WILSON NORRIS,
Auditor General.

Endorsement: No. 576. June term, 1888. Commonwealth of Pennsylvania *vs.* Lehigh Valley Railroad Company. Appeal from the settlement of an account by the auditor general and State treasurer. Filed in the auditor general's office the 15th day of May, 1888. Jno. A. Glenn, for A. Wilson Norris, auditor general. Filed in the prothonotary's office the 28th day — May, 1888. W. H. Ulrich, prothonotary. M. E. Olmsted, attorney for defendant.

10 *Bond.*

Know all men by these presents that we, The Lehigh Valley Railroad Company and John B. Garrett and John R. Fanshawe, of the city of Philadelphia and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of thirty-eight thousand one hundred eighty& $\frac{80}{100}$ dollars ($38,180.80), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company and dated the first day of June, A. D. 1888.

Whereas the above-bounden Lehigh Valley Railroad Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on gross receipts, amounting to $30,413.66, upon which there has been paid or it is proposed to pay $11,323.26, leaving a balance of nineteen thousand ninety and $\frac{40}{100}$ dollars ($19,090.40), made by the auditor general on the 4th day of April and approved by the State treasurer on the 17th day of April, 1888:

Now, the condition of this obligation is such that if the said Lehigh Valley Railroad Company shall prosecute its said appeal with effect and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

LEHIGH VALLEY RAILROAD COMPANY,
By JOHN B. GARRETT, *3rd Vice-President.*

Attest:
[SEAL.] JNO. R. FANSHAWE, *Secretary.*
JOHN B. GARRETT. [SEAL.]
JNO. R. FANSHAWE. [SEAL.]

Signed, sealed, and delivered in presence of—
D. G. BAIRD.
F. H. EVANS.

The security of the above bond is approved.

T. K. FINLETTER.

(Must be signed by a judge of some court in county where sureties reside.)

11 Endorsement: No. 576. June term, 1888. Commonwealth of Pennsylvania *vs.* Lehigh Valley Railroad Company. Bond on appeal from the settlement of an account by the auditor general and State treasurer. June 4, 1888. The security of the within bond approved. By the court. J. W. Simonton, P. J. Filed June 4th, 1888. M. E. Olmsted, attorney for defendant.

12 *Narr.*

In Dauphin Common Pleas, No. 576, June Term, 1888.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of The Lehigh Valley Railroad Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants, on the 17th day of April, A. D. 1888, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of thirty thousand four hundred and thirteen $\frac{66}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon, at the rate of twelve per centum per annum, from and after the expiration of sixty days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, for tax on gross receipts, per act of June 7th, 1879, for six months ending December 31st, 1887, which said account was, on the 17th day of April, A. D. 1888, submitted to, revised, and approved by the State treasurer and a copy thereof thereafter sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and appealed from, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, parcel of the said sum above demanded, with interest and other legal charges; and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money;

And whereas, also, the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the
13 use of the said plaintiff; and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general and State treasurer of this Commonwealth against the said defendants on the day and year in the first count mentioned for tax on gross receipts, and approved by the State treasurer on the day and year in the first count mentioned;

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request; yet the said defendants have disregarded their said promises, and, although often requested so to do, have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

JNO. F. SANDERSON,
Deputy Attorney General.

Lehigh Valley Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on gross receipts, per act of June 7th, 1879, for six months ending Dec. 31, 1887, as per reports herewith filed:

Gross receipts	$4,726,083 87
Proportion taxable in Penna., $\frac{271.07}{349.98}$	3,801,710 94
Tax at rate of eight-tenths of one per cent.	$30,413 66
Due Commonwealth	$30,413 66

☞(This account bears interest at rate of 12 per centum per annum from sixty days after date of State treasurer's approval. Return this with check in payment of amount due to State treasurer. Give post-office address of company.)

14 AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Apr.* 4, 1888.

Settled and entered.

JOHN A. GLENN,
For A. WILSON NORRIS,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *April* 17, 1888.

Approved.

W. LIVSEY,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *July* 31, 1888.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office the day and year aforesaid.

JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

Endorsement: No. 576. June term, 1888. Commonwealth of Pennsylvania *vs.* Lehigh Valley Railroad Company. *Narr.* and copy of account. Filed Aug. 9, 1888. W. S. Kirkpatrick, attorney general.

15 COMMONWEALTH OF PENNSYLVANIA *vs.* LEHIGH VALLEY RAILROAD CO. | In the Court of Common Pleas of Dauphin County. No. 576. June Term, 1888.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court, to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court and to dispense with the trial by jury," approved the 22nd day of April, 1874, subject, however, to a writ of error, as in other cases, at the option of either party.

Oct. 8, 1888.

JNO. A. SANDERSON,
Deputy Attorney General.
M. E. OLMSTED,
Att'y for Defendant.

Endorsement: No. 576. June term, 1888. Commonwealth *vs.* Lehigh Valley Railroad Company. Stipulation to try without a jury. Filed Oct. 13, 1888.

16 *Report.*

To the auditor general of Pennsylvania:

In accordance with the requirements of the seventh section of an act entitled "An act to provide revenue by taxation," approved June 7, 1879, as treasurer of the Lehigh Valley Railroad Company I make the following report of the gross receipts of said company for the six months ending December 31, 1887. On account of the great labor required, it has been impossible to prepare an accurate report satisfactory to the auditor general at an earlier day.

(Signed) WM. C. ALDERSON, *Treasurer.*

OFFICE OF THE LEHIGH VALLEY RAILROAD COMPANY,
228 SOUTH THIRD STREET,
PHILADELPHIA, PA., *March 28th*, 1888.

Gross receipts derived from all sources during the above period as follows:

For transportation of coal	$2,867,128 18
For transportation of freight other than coal	1,211,965 47
For transportation of passengers	611,736 28
For transportation of express matter	18,796 27
For transportation of U. S. mails	16,457 67
Total receipts	$4,726,083 87
Total miles of railroad, from the operation of which said receipts were derived	336.98
Total miles of said railroad in Pennsylvania	271.07

The main line of railroad operated by the Lehigh Valley Railroad Company extends from Perth Amboy, New Jersey, to Wilkes Barre, Pennsylvania, with numerous branches in Pennsylvania and New Jersey. The company has also running arrangements with other companies whereby it runs its own trains in a through line from Jersey City, New Jersey, to Buffalo, New York.

A very large portion of its business consists of the transportation of freight, passengers, &c., either from points in Pennsylvania to points in other States or from points in other States to points in Pennsylvania or from points in other States to points in other States, passing through the State of Pennsylvania, about one-half of its entire receipts being derived from the transportation of anthracite coal from Pennsylvania into other States.

The following detailed statement shows the several classes of transportation from which the receipts above returned were derived:

Coal.

Receipts from transportation of coal from points in Pennsylvania to points in Pennsylvania without passing out of the State	$561,312 34
Receipts from transportation of coal by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but carried out of the State into other States and back again into Pennsylvania in course of transportation	163,627 07
Receipts from transportation of coal by continuous carriage from points in other States to points in Pennsylvania	3,080 07
Receipts from transportation of coal by continuous carriage from points in Pennsylvania to points in other States	2,139,108 70
Total receipts from transportation of coal	$2,867,128 18

17 *Freight Other Than Coal.*

Receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State	$466,929 04
Receipts from continuous transportation from points in Pennsylvania to other points in Pennsylvania, but passing out of Pennsylvania into other States and back again into Pennsylvania in course of transportation	11,098 98
Receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, passing through the State of Pennsylvania	67,873 57
Receipts from transportation by continuous carriage from points in other States to points in Pennsylvania	305,914 64
Receipts from transportation by continuous carriage from points in Pennsylvania to points in other States	176,946 10
Receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania, to points in a third State	146,327 47
Receipts from transportation from points in foreign States to other points in foreign States not touching the State of Pennsylvania	36,875 [illegible]7
Total	$1,211,965 47

Passengers.

Receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State	$387,165 94
Receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but passing out of Pennsylvania into other States and back again into Pennsylvania in course of transportation	2,289 97
Receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, passing through the State of Pennsylvania	16,989 51
Receipts from transportation by continuous carriage from points in other States to points in Pennsylvania	91,391 80
Receipts from transportation by continuous carriage from points in Pennsylvania to points in other States	81,171 11
Receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania, to points in a third State	3,046 91

Receipts from transportation from points in foreign States to other points in foreign States not touching the State of Pennsylvania	29,681 04
Total	$611,736 28

18 *Express.*

Receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State	$12,095 34
Receipts from transportation by continuous carriage from points in Pennsylvania to other points — Pennsylvania, but passing out of Pennsylvania into other States and back again into Pennsylvania in course of transportation	
Receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, passing through the State of Pennsylvania	
Receipts from transportation by continuous carriage from points in other States to points in Pennsylvania	3,000 00
Receipts from transportation by continuous carriage from points in Pennsylvania to points in other States	2,687 75
Receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania, to points in a third State	
Receipts from transportation from points in foreign States to other points in foreign States, not touching the State of Pennsylvania	1,013 18
Total	$18,796 27

Mail.

Receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State	$12,634 41
Receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but passing out of Pennsylvania into other States and back again into Pennsylvania in course of transportation	
Receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, passing through the State of Pennsylvania	
Receipts from transportation by continuous carriage from points in other States to points in Pennsylvania	

Receipts from transportation by continuous carriage from points in Pennsylvania to points in other States	
Receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania, to points in a third State	
Receipts from transportation from points in foreign States to other points in foreign States, not touching the State of Pennsylvania	3,823 26
Total	$16,457 67

19 *Summary.*

1. Total receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State	$1,440,137 07
2. Total receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but passing out of the State into other States and back again into Pennsylvania in course of transportation	177,016 02
3. Total receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, after passing through the State of Pennsylvania	84,863 08
4. Total receipts from transportation by continuous carriage from points in other States to points in Pennsylvania	403,386 51
5. Total receipts from transportation by continuous carriage from points in Pennsylvania to points in other States	2,399,913 66
6. Total receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania and ending in a third State	149,374 38
7. Total receipts from transportation from points in foreign States to other points in foreign States not touching Pennsylvania	71,393 15
Total receipts	$4,726,083 87

Wherever in this report I use the term "continuous transportation" or "continuous carriage," the freight, passengers, &c., were carried between the points mentioned for a single charge or sum and upon a single way-bill or ticket, and were, when taken upon the cars at the one point, destined to be carried and were carried continuously to the other point, there being but one single contract between the company and the passenger or owner of the freight transported covering the entire distance.

This report is made agreeably to the provisions of the act of as-

sembly above referred to and in deference to the request of the auditor general, not, however, in admission of any liability on the part of the company to the Commonwealth of Pennsylvania for taxation upon or in respect of any of the receipts herein returned, but, on the contrary, denying and protesting against such liability and reserving to the company all legal rights in the premises.

(Signed) WM. C. ALDERSON, *Treasurer.*

STATE OF PENNSYLVANIA, } ss:
City of Philadelphia, }

On this 28th day of March, 1888, before me, the subscriber, a notary public in and for said State, residing in said city, personally appeared Wm. C. Alderson, who, being by me duly affirmed
20 according to law, did depose and say that he is the treasurer of the Lehigh Valley Railroad Company, and that the foregoing report is correct and true according to the best of his knowledge, information, and belief.

(Signed) WM. C. ALDERSON.

Affirmed and subscribed before me the day and year aforesaid.

J. HENRY WILLIAMS,

[SEAL.] *Notary Public.*

Endorsement: Copy. 576. June term, 1888. Gross receipts. Report of the Lehigh Valley Railroad Company, six months ending December 31st, 1887. Filed Dec. 3, 1888.

21 COMMONWEALTH OF PENNSYLVANIA *vs.* LEHIGH VALLEY RAILROAD COMPANY } In Dauphin Common Pleas, No. 576, June Term, 1888. Appeal from Accounting Officers.

Opinion of the Court.

By the COURT:

This case was tried without a jury, under the act of 1874. We find the facts to be as follows:

1. The defendant is a railroad company doing business in this Commonwealth. Its own railway is partly within and partly without the State of Pennsylvania, and it connects also with other lines in other States.

2. For the six months ending December 31, 1887, its gross receipts for transportation were $4,726,083.87 Of this amount $1,440,137.07 was received for transportation beginning and ending in Pennsylvania, without passing out of the State in course of transit; $177,016.02 was received for transportation beginning and ending in Pennsylvania, but passing out of the State and in again in course of transit. So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and the receipts named were for that particular transportation; but the freight and passengers were there delivered upon

the railroad of another company, to wit, the Belvidere, Delaware Railroad Company, a line operated by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to, hereto annexed, and marked Exhibit A. The transportation of freight was upon a joint way-bill of the Lehigh Valley and Pennsylvania Railroad Companies, and this way-bill covered the whole transportation. A form is annexed, referred to, and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley railroad at the point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis—that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried. One-twentieth of the said receipts were derived from passenger transportation; $84,863.08 was received for transportation beginning in a foreign State and ending in the same State, but passing through the State of Pennsylvania in course of transit; $403,386.51 was received for transportation from points in other States to points in Pennsylvania; $2,399,913.66 was received for transportation beginning in Pennsylvania and ending in other States; $149,374.38 was for transportation beginning in a foreign State and ending in a third State, but passing through the State of Pennsylvania in course of transit, and $71,393.15 was for transportation beginning and ending in foreign States, not touching Pennsylvania in course of transit. Of the item of $1,440,137.07, $12,095.34 was received for the transportation of express matter and $12,634.41 from the U. S. Government for the transportation of the mails. Of the item of $403,386.51, $3,000 was received for the transportation of express matter, and of the
22 item of $2,399,913.66, $2,687.75 was received for the transportation of express matter; of the item $71,393.15, $1,013.18 was for transportation of express matter and $3,823.26 for transportation of the U. S. mails. In the second, third, fourth, fifth, and sixth classes the transportation was continuous from the point of beginning to the point of ending, and the freight and passengers were carried for a single sum or charge and upon a single way-bill or ticket.

3. This settlement taxes $\frac{2}{3}\frac{3}{5}\frac{1}{6}\frac{0}{9}\frac{7}{8}$ of the entire sum of $4,726,083.87 (that fraction representing defendant's mileage within the State) for the six months ending December 31, 1887, and is made under section 7 of the act of 1879. (P. L., 116.)

4. The defendant has paid to the Commonwealth the sum of $11,323.26, being the tax at eight-tenths of one per cent. upon the item of $1,440,137.07, mentioned in finding of fact No. 2, less the

EXHIBIT A.

No. _____

Belvidere
Frenchtown
Lambertville
Manunka Ch.
Milford
Martins C'k
Philadelphia
Riegelsville
Trenton.

Rate, $ _____

Form 355.

STUBS TO BE RETAINED BY AGENTS.

TO AGENTS.

This Ticket can be issued to points named on each coupon in small type. Fill in destination on blank space with ink and cross off the same on each **Coupon** and **Stub**. If issued to a point on Pennsylvania R. R. (Bel.-Del. Div.) not named on this ticket, write **Destination** in blank spaces on right of each coupon and on face of stub.

Agents are requested to write or stamp the name of their station on first or lower coupon as soon as possible after tickets are received, in order to save time in issuing tickets.

ISSUED BY
LEHIGH VALLEY
RAIL ROAD.

GOOD FOR ONE PASSAGE
TO THE
POINT AND OF THE CLASS DESIGNATED IN COUPON ATTACHED.
WHEN OFFICIALLY STAMPED.

Subject to the following Contract:

1st. In selling this Ticket this Company acts as Agent, and is not responsible beyond its own line.

2nd. NO STOP-OVER WILL BE ALLOWED hereon, unless specially provided for by the local regulations of the lines over which it reads.

3rd. It is not good for passage if any alterations whatever are made hereon.

4th. **This Ticket is not valid** after date indicated by "L" punch cancellations on margin, and if more than one date is cancelled it is void.

5th. **If this Contract and its Coupons bear no "L" punch cancellations the passenger is entitled to all the privileges accorded to holders of an unlimited First Class Tickets.**

DAY	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
JAN.																															
FEB.																															
MAR.																															
APR.																															
MAY																															
JUNE																															
JULY																															
AUG.																															
SEPT.																															
OCT.																															
NOV.																															
DEC.																															

6th. None of the Companies represented in this Ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding $100.

7th. The Coupons belonging to this Ticket will not be received for passage if detached.

E. B. Byington,
General Passenger Agent.

1888	1889
1890	1891
1892	1893
1894	1895
1896	1897
1898	1899
1900	1901
1902	1903
1904	1905
1906	1907
1908	1909

ISSUED BY **Lehigh Valley R. R.**

PENN. R. R. (Bel.-Del. Div.)
PHILLIPSBURG
TO
PHILADELPHIA

IF LIMITED **L** Punch Here.

Belvidere · Frenchtown · Lambertville · Manunka Ch. · Milford · Martins C'k · Philadelphia · Riegelsville · Trenton

355

FIRST CLASS
THIS CHECK NOT GOOD IF DETACHED.

Via LV, P.

ISSUED BY **Lehigh Valley R. R.**

LEHIGH VALLEY R. R.
MAUCH CHUNK
TO
PHILLIPSBURG

IF LIMITED **L** Punch Here.

Belvidere · Frenchtown · Lambertville · Manunka Ch. · Milford · Martins C'k · Philadelphia · Riegelsville · Trenton

355

FIRST CLASS
THIS CHECK NOT GOOD IF DETACHED.

Via LV, P.

The Lehigh Valley Railroad Co. vs. The Commonwealth of Pennsylvania, } No. 429. } P. 23.

items of $12,095.34 and $12,634.41, mentioned in the same paragraph.

Conclusions of Law.

The questions raised by this appeal were discussed in Com. *vs.* Delaware and Hudson Canal Company, 21 W. N. C., 406; Com. *vs.* Delaware, Lackawanna and Western Railroad Company, *ibid.*, 412, and Com. *vs.* New York, Lake Erie and Western Railroad Company, *ibid.*, 410. For reasons there given we hold that the Commonwealth is entitled to tax only upon $1,604,518.68, being the sum of $1,440,137.07 and $177,016.02, receipts for transportation both beginning and ending in Pennsylvania, less $12,634.41, receipts for transportation of U. S. mail.

The sum due the Commonwealth is as follows:

Tax $\frac{8}{10}$ of one per cent. upon $1,604,518.68	$12,836 15
Upon which there has been paid into the State treasury the sum of	11,323 26
Leaving a balance of	$1,512 89
Interest from June 17, 1888, to October 10, 1888	56 98
Attorney general's commission	75 64
Total	$1,645 51

For which amount we direct judgment to be entered if exceptions are not filed according to law.

(Signed) J. W. SIMONTON, *P. J.*

Endorsement: No. 576. June term, 1888. Commonwealth of Pennsylvania *vs.* Lehigh Valley Railroad Company. Finding of facts and opinion. Filed Dec. 3, 1888.

(Here follows diagram marked p. 23.)

EXHIBIT B.

(F. O. form 281) B. 5M—9-8-'88.

Scale: Packerton.

Joint Coal Way-Bill.

Lehigh Valley & Pennsylvania R. R.

Notice to Agents.

The agent at station where this bill is consigned will examine it carefully, and if any error should appear in weight, rate, extension of freight, or the No. or numbers and kind of cars, or if any cars are missing, he will at once report to auditor of coal freights, Mauch Chunk, Pa., for correction or investigation.

MAUCH CHUNK, PA., ——, 188–.

Rules and Regulations Adopted by the L. V. R. R. Co.

First. All claims for lost coal must be made by the shipper. This company will in no case settle such claims with consignee.

Second. Coal will not be allowed for if lost from being loaded in broken or defective cars or in cars with the doors not shut close. After a shipment of coal has been way-billed at Packerton and the consignment ordered to be changed the rate charged shall be an addition of fifteen cents per ton to the regular rate for each time it is so changed, and shall be collected of the party who receives the coal, except in case of through coal, when the charge will be collected of the consignor.

L. V. No. —.

From —— region mines to ——.

No. —.

Shipper's manifest.	Kind of cars.	No. of cars.	Car numbers. Cars are rated as follows: A, 2 cars; B, 3 cars; C, 3 cars; D, 4 cars.	Consignor.	Consignee.	Destination.	Weight. Tons. Cwt. Total.	Rate.	Freight

25 *Receipt of Attorney General.*

OFFICE OF ATTORNEY GENERAL.

In the Court of Common Pleas of Dauphin County, June Term, 1888.

COMMONWEALTH OF PENNSYLVANIA
vs.
LEHIGH VALLEY RAILROAD CO. } No. 576.

Received, Dec. 18, 1888, of defendant the sum of one hundred and five dollars twenty-four cents ($105.24) on account of above-stated judgment, to wit:

Tax	$96 76
Interest	3 65
Attorney general's commission	4 83
	$105 24

Leaving a balance in dispute as follows:

Tax	$1,416 13
Interest	53 33
Attorney general's commission	70 81
Total	$1,540 27

JNO. A. SANDERSON,
Deputy Attorney General.

Endorsement: No. 576. June term, 1888. Commonwealth *vs.* Lehigh Valley Railroad Co. Receipt. Filed Dec. 18, 1888.

Receipt of State Treasurer.

(Duplicate.)

TREASURY DEPARTMENT OF PENNSYLVANIA,
HARRISBURG, *June* 20, 1888.

Received from Lehigh Valley Railroad Company eleven thousand three hundred and twenty-three dollars and twenty-six cents on account, to wit:

Tax on gross receipts, $11,323.26, being tax on receipts from transportation wholly within the State of Pennsylvania for the six months ending Dec. 31, 1887; paid under protest.

26 H. C. GREENAWALT,
For W. B. HART,
State Treasurer.

Registered and countersigned.

D. L. IMBRIE,
For THOMAS McCAMANT,
Auditor General.

Endorsement. 576. June term, 1888. Commonwealth of Pennsylvania *vs.* Lehigh Valley Railroad Company. State treasurer's receipt for $11,323.26.

27 COMMONWEALTH OF PENNSYLVANIA } 576. In the Court of
vs. C. P. of Dauphin Co.,
LEHIGH VALLEY RAILROAD COMPANY. } June T., 1888.

Defendant's Exceptions to Decision of the Court.

This case having been tried without jury under the act of April 22, 1874 (P. L., 109), defendant files the following exceptions to the decision of the court:

1. The court erred in including in the judgment directed to be entered in favor of the Commonwealth a tax upon the item of $177,016.02, being the receipts of the Lehigh Valley Railroad Company for transportation of freight and passengers from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, said freight and passengers having been carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, as stated in finding of fact No. 2, the taxation of receipts so derived being in violation of that clause of the Constitution of the United States which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

2. The court erred in deciding, relative to the item of $177,016.02, receipts of the Lehigh Valley Railroad Company for the transportation from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, that "in principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be."

3. Having found as a fact that concerning the item of $177,016.02—

"So far as the defendant is concerned the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and the receipts named were for that particular transportation. But the freight and passengers were there delivered upon the railroad of another company, to wit, the Belvidere, Delaware, Railroad Co., a line operated by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Phil

adelphia, and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to, hereto annexed, and marked Exhibit A. The transportation of freight was upon the joint way-bill of the Lehigh Valley and Pennsylvania Railroad Companies, and this way-bill covered the whole transportation. A form is annexed, referred to, and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis—that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried. One-twentieth of the said receipts were derived from passenger transportation "—

the court erred in not deciding that the transportation by the Lehigh Valley Railroad Company, from which the said receipts were derived, was interstate transportation, and that the taxa-
28 tion of the receipts for such transportation was in violation of that clause of the Constitution of the United States which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

4. The court erred in directing judgment to be entered in favor of the Commonwealth for $1,645.51.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

Harrisburg, Pa., December 17th, 1888.

Order of Court Overruling Exceptions.

And now, to wit, December 17, 1888, the above exceptions are overruled and judgment directed to be entered in accordance with the opinion heretofore filed.

(Signed) J. W. SIMONTON,
President Judge.

To this ruling defendant, by its counsel, excepts, and, at its request, exception sealed.

(Signed) J. W. SIMONTON, *P. J.* [SEAL.]

Endorsement: 576. June T., 1888. Commonwealth of Pennsylvania *vs.* Lehigh Valley Railroad Company. Defendant's exceptions and order of court overruling the same. Filed Jan. 11, 1889.

29 (*Supreme Court Docket Entries.*)

In the Supreme Court of Pennsylvania in and for the Middle District of said Court.

At a supreme court of the State of Pennsylvania sitting in and for the middle district of said court, at the city of Harrisburg,

Pennsylvania, on the 21st Monday following the 1st Monday of January, A. D. 1889—present, Hon. Edward M. Paxson, chief justice, and Hon. James P. Sterrett, Henry Green, Silas M. Clark, Henry W. Williams, J. Brewster McCullum, and James T. Mitchell, justices, and William Pearson, prothonotary, of the said supreme court of Pennsylvania in and for the said middle district—to May term, 1889, No. 24, it is contained as follows, to wit:

Writ of error to the court of common pleas of Dauphin county.

No. 524. June Term, 1888.

LEHIGH VALLEY RAILROAD COMPANY, Defendant Below,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below. } 23.

M. E. Olmsted.

Jan. 28, 1889.—Precipe, aff., and recog. filed; *eo die*, exit writ of error, returnable *sec. reg.*

April 30th, 1889.—Assignments of error filed.

June 3d, 1889.—Record returned and filed.

June 4th, 1889.—Argued.

June 28, 1889.—Judgment affirmed *per curiam.*

Aug. 27th, 1889.—Writ of error from the Supreme Court of the United States received and filed.

Aug. 30, 1889.—Petition for allocatur of said writ by said court; allocatur of said writ by Hon. Joseph P. Bradley, jus-
30 tice of court; citation from said justice; affidavit of service thereof on deputy attorney general of Pennsylvania and writ of error bond in the sum of $2,500 received and filed.

Sept. 18th, 1889.—Transcript of record certified to Supreme Court of the United States.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of Supreme Court of Pennsylvania.

31 (*Precipe.*)

In the Supreme Court of Pennsylvania for the Middle District.

LEHIGH VALLEY RAILROAD CO., Defendant Below, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, Defendant in Error.

Issue writ of error to the court of common pleas of Dauphin county to remove the record and proceedings in a certain appeal

depending therein to No. 576 of June term, 1888, returnable to May term, 1889.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

To Wm. Pearson, prothonotary supreme court of Pa., middle district.

(*Affidavit.*)

DAUPHIN COUNTY, *ss:*

M. E. Olmsted, attorney for the above-named plaintiff in error, being duly sworn according to law, deposes and says that the writ of error in this case is not intended for delay.

M. E. OLMSTED.

Sworn and subscribed before me this — day of January, 1889.
WILLIAM PEARSON,
Prothonotary.

32 (*Writ of Error.*)

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between The Lehigh Valley Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, to No. 576, June term, 1888, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday foll. 1 Mon. of Jan., 1889, being the 1st Monday of the term, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Edward M. Paxson, doctor of laws, chief justice of our supreme court, at Harrisburg, the 28th day of Jan. in the year of our Lord one thousand eight hundred and eighty-nine, and of the Commonwealth the one hundred and thirteenth.

WILLIAM PEARSON,
Prothonotary.

33 Endorsement: No. 24. May term, 1889. Supreme court, middle district. Lehigh Valley Railroad Company, plaintiff in error, *vs.* Com. of Penna., defendant in error. Writ of error to the court of common pleas for the county of Dauphin. (No. 576. June term, 1889.) Returnable the 21st Mon. foll. 1 Mon. of Jan., 1889. Rule on defendant in error to appear and plead on the return day of the writ. N. B.—10 days' notice to the parties or counsel below is necessary to compel an appearance. Filed in supreme court June 3, 1889. Filed Jan. 28, 1889.

34 *Return to Writ of Error.*

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

J. W. SIMONTON, *C. J.* [SEAL.]

35 Endorsment: No. 24. May term, 1889. Supreme court of Pennsylvania, middle district. Lehigh Valley Railroad Company, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error. Dauphin county. Præcipe and affidavit for writ of error. Filed in the supreme court Jan. 28, 1889. Middle district. M. E. Olmsted, attorney for plaintiff in error.

Assignments of Error.

The learned court erred in overruling the first exception filed by defendant, which was as follows:

"The court erred in including in the judgment directed to be entered in favor of the Commonwealth a tax upon the item of $177,016.02, being the receipts of the Lehigh Valley Railroad Company for transportation of freight and passengers from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, said freight and passengers having been carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, as stated in finding of fact No. 2, the taxation of receipts so derived being in violation of that clause of the Constitution of the United States which declares that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

2. The learned court erred in overruling the second exception filed by defendant, which was as follows:

"The court erred in deciding, relative to the item of $177,016.02, receipts of the Lehigh Valley Railroad Company for the transportation from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, that 'in principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In

reality and substance the commerce here is purely internal, whatever the mere form of it may be,'"

3. The learned court erred in overruling the third exception filed by defendant, which was as follows:

"Having found as a fact that concerning the item of $177,116.02—'So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and the receipts named were for that particular transportation; but the freight and passengers were there delivered upon the railroad of another company, to wit, the Belvidere, Delaware, Railroad Co., a line operated by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia, and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred
36 to, hereto annexed, and marked Exhibit A. The transportation of freight was upon the joint way-bill of the Lehigh Valley and Pennsylvania Railroad Companies, and this way-bill covered the whole transportation. A form is annexed, referred to, and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis—that is to say, each company's share was in the proportion that the number of miles carried by it bore to the number of miles carried. One-twentieth of the said receipts were derived from passenger transportation'—

The court erred in not deciding that the transportation by the Lehigh Valley Railroad Company from which the said receipts were derived was interstate transportation, and that the taxation of the receipts for such transportation was in violation of that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

4. The learned court erred in overruling the fourth exception filed by defendant, which was as follows:

"The learned court erred in directing judgment to be entered in favor of the Commonwealth for $1,645.51."

Endorsement: 24. May term, 1889. Lehigh Valley Railroad Company, plaintiff in error, defendant below, *vs.* Commonwealth of Pennsylvania, defendant in error, plaintiff below. Assignments of error. Filed May 1st, 1889. Olmsted.

37 *Copy of Opinion of Supreme Court.*

LEHIGH VALLEY RAILROAD COMPANY } M. D. Nos. 23 & 24. May
vs. T., 1889. Error to C. P.
COMMONWEALTH OF PENNSYLVANIA. } of Dauphin Co.

Per Curiam:

There is no essential difference in the facts of these two cases. They present the single question whether transportation from one point to another point in the same State is interstate commerce for the reason that in the course of such transportation the property in question passes the boundaries of the State. The same point was before us last year in a proceeding between the same parties, and we determined it in favor of the Commonwealth. We adhere to the same ruling now, which will enable the cases to be reviewed by the Supreme Court of the United States and our decision corrected if erroneous.

The judgment in each case is affirmed.

38 *Remittitur.*

MIDDLE DISTRICT OF PENNSYLVANIA, *set:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Whereas, by virtue of our writ of error from our supreme court of Pennsylvania in and for the middle district, returnable in the said court on the 21st Monday foll. 1st Mon. of Jan., in the year of our Lord one thousand eight hundred and eighty-nine, a record was brought into the same court of a judgment rendered against The Lehigh Valley Railroad Company, plaintiff in error, at the suit of The Commonwealth of Pennsylvania, defendant in error, and it was so proceeded in our supreme court that the said judgment was affirmed and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon in order for execution or otherwise as aforesaid.

Witness the Hon. Edward M. Paxson, chief justice of our supreme court, at Harrisburg, the 3rd day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

WILLIAM PEARSON,
Prothonotary.

39 *Petition for Writ of Error.*

To the Honorable Joseph P. Bradley, justice of the Supreme Court of the United States:

The petition of the Lehigh Valley Railroad Company respectfully showeth—

That your petitioner is a corporation created by and existing under the laws of the State of Pennsylvania, having its principal office and place of business in the city of Philadelphia, in said State.

That its own railway is partly within and partly without the State of Pennsylvania, and that it has running arrangements with other lines in other States.

That by the seventh section of the act of the General Assembly of Pennsylvania, approved June 7, 1870 (P. L., 112), a tax of eight-tenths of one per centum is imposed upon the gross receipts of railroad companies for tolls and transportation, telegraph business, or express business.

That the auditor general and State treasurer of Pennsylvania settled an account against your petitioner for tax on gross receipts claimed to be due under the said seventh section of the act of 1879 for the six months ending Dec. 31, 1887.

That agreeably to law your petitioner appealed from the action of the auditor general and State treasurer to the court of common pleas of Dauphin county, to No. 576, June term, 1888, claiming in its appeal that the said tax was in violation of that clause of section 8 of article 1 of the Constitution of the United States which provides that "Congress shall have power * * * to regulate
40 commerce with foreign nations and among the several States," &c.

That by agreement of the parties the said cause was heard by the court without the intervention of a jury, the court finding both the law and the facts agreeably to the provisions of an act of the General Assembly of Pennsylvania approved April 22, 1874 (P. L., 109).

That the said court in its finding of facts correctly declared that the total gross receipts of your petitioner for transportation during the period embraced in the suit were $4,726,083.87, of which $1,440,137.07 was received for transportation beginning and ending in Pennsylvania without passing out of the State in course of transit and $177,016.02 for transportation of freight and passengers which were carried by your petitioner from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and there delivered upon the Belvidere, Delaware, railroad operated by the Pennsylvania Railroad Company, upon which railroad the said freight and passengers were carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia, the transportation being continuous and upon the joint way-bill or ticket of the Lehigh Valley and Pennsylvania Railroad Companies, each company's share of receipts from such transportation being in the proportion

that the number of miles carried by it bore to the total number of miles carried, the balance of said $4,726,083.87 having been received from the transportation of freight and passengers between points in Pennsylvania and points in other States or between points in
41 other States passing through Pennsylvania to points in other States.

That the said court, sustaining in part the appeal of your petitioner, declared the tax unconstitutional so far as it applied to receipts derived from transportation between points in Pennsylvania and points in other States or between points in other States passing through Pennsylvania to points in other States, but sustained the tax as to the items of $1,440,137.07 and $177,016.02 above mentioned.

That your petitioner, admitting its liability to taxation upon the larger of said items derived from transportation beginning and ending in Pennsylvania without passing out of the State in course of transit, has paid the tax thereon into the State treasury, but did, within the proper time, file an exception to the ruling of the court in regard to the said item of $177,016.02, receipts derived from transportation by your petitioner from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers destined for and by continuous transportation over connecting roads passing through the State of New Jersey, delivered at Philadelphia, Pennsylvania, and in said exception did again allege that the taxation of receipts so derived was in violation of the commercial clause of the Federal Constitution.

That the said court did, December 17, 1888, overrule the said exceptions of your petitioner and direct judgment to be entered in accordance with its opinion theretofore filed, embracing tax upon the said item of $177,016.02.

That thereupon your petitioner by writ of error carried
42 the said cause to the supreme court of Pennsylvania, to No. 24 May term, 1889, in the middle district thereof, assigning as an error the overruling by the court of common pleas of Dauphin county of the exceptions filed by your petitioner as aforesaid and the entry by the said court of judgment embracing tax upon the said item of $122,833.05.

That the supreme court of Pennsylvania upon the twenty-eighth day of June, A. D. 1889, affirmed the judgment of the court of common pleas of Dauphin county.

That the supreme court of Pennsylvania, in which said cause was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania.

That the judgment of said court is final.

That the judgment of said court, as already shown, necessarily involved the decision of a Federal question, and that said decision is in favor of the State law and against the immunity claimed by your petitioner under the Constitution of the United States.

Wherefore your petitioner (presenting herewith a bond, with security, for approval) prays that a writ of error may be allowed to issue to the said supreme court of Pennsylvania to bring up the

record to the Supreme Court of the United States for correction in that which violates the Constitution and laws thereof, and that the citation to the defendant may accompany the same; and it will ever pray, &c.

LEHIGH VALLEY RAILROAD COMPANY,

By its attorney, —— ——.

[Endorsed:] Copy. In the U. S. Supreme Court. Lehigh Valley Railroad Co. (plaintiff in error) *vs.* Commonwealth of Pennsylvania (defendant in error). Petition for writ of error.

43 (*Writ of Error Bond.*)

Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error, *vs.* COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.	In Error to the Supreme Court of Pennsylvania, Middle District. No. 23. May Term, 1889.

Know all men by *te* these presents that we, The Lehigh Valley Railroad Company and Charles Hartshorne and John B. Garrett, of the city of Philadelphia and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of twenty-five hundred dollrars ($2,500), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and successors, firmly by these presents.

Sealed with our seals and dated the 15th day of July, A. D. 1889.

Whereas lately, in the court of common pleas in and for the county of Dauphin, judgment was entered against The Lehigh Valley Railroad Company at the suit of the Commonwealth of Pennsylvania, of June term, 1887, No. 524, which judgment was afterwards affirmed by the State of Pennsylvania in a certain plea and suit in said court, of May term, 1889, No. 23, in the middle district of said court, and the said Lehigh Valley Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of Pennsylvania:

44 Now, the condition of this obligation is such that if the above-named Lehigh Valley Railroad Company, plaintiff in error, shall prosecute its writ of error with effect and answer all damages and costs and if it shall fail to make good its plea, then this obligation is to be void; otherwise to remain in full force and virtue.

LEHIGH VALLEY RAILROAD COMPANY,
By CHARLES HARTSHORNE, *Vice-President.*

[Seal of Lehigh Valley Railroad Company.]

Attest: JOHN R. FANSHAW, *Secretary.*

CHARLES HARTSHORNE. [SEAL.]

JOHN B. GARRETT. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. BEIDLER.
ELLIS G. BROWN.

This bond is approved for supersedeas August 23d, 1889, by—
JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court of the United States.

45 STATE OF PENNSYLVANIA, }
City of Harrisburg, } *ss:*

In testimony that the foregoing, contained on pages one to forty-four, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 24, of May term, 1889, wherein the Lehigh Valley Railroad Company was plaintiff in error and the said Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 18th day of September, A. D. 1889.

{ Seal of the Supreme Court of Pennsylvania, Middle District, 1776. }

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

46 In the Supreme Court of the United States. No. 1244. October Term, 1889.

LEHIGH VALLEY RAILROAD COMPANY }
vs.
COMMONWEALTH OF PENNSYLVANIA. }

Surwrit of error by Lehigh Valley Railroad Company to the supreme court of Pennsylvania.

Assignments of Error.

1. The learned court erred in not sustaining the company's first exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in including in the judgment directed to be entered in favor of the Commonwealth a tax upon the item of $177,016.02, being the receipts of the Lehigh Valley Railroad Company for transportation of freight and passengers from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, said freight and passengers having been carried by the Pennsylvania Railroad Company from Phillipsburgh through the State of New Jersey, by way of Trenton, to Philadelphia, as stated in finding of fact No. 2, the taxation of receipts so derived being in violation of that clause of the Constitution of the United States which declares that Congress

shall have power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

2. The learned court erred in not sustaining the company's second exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in deciding, relative to the item of $177,016.02, receipts of the Lehigh Valley Railroad Company for the transportation from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers carried by the Pennsylvania Railroad Company from Phillipsburgh through the State of New Jersey, by way of Trenton, to Philadelphia, that 'in principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be.'"

47 3. The learned court erred in not sustaining the company's third exception to the decision of the court of common pleas of Dauphin county, viz:

"Having found as a fact that concerning the item of $177,116.02, 'so far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and the receipts named were for that particular transportation; but the freight and passengers were there delivered upon the railroad of another company, to wit, the Belvidere, Delaware, Railroad Co., a line operated by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia, and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to, hereto annexed and marked Exhibit A. The transportation of freight was upon the joint way-bill of the Lehigh Valley and Pennsylvania Railroad Companies, and this way-bill covered the whole transportation. A form is annexed, referred to, and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis—that is to say, each company's share was in the proportion that the number of miles carried by it bore to the number of miles carried. One twentieth of the said receipts were derived from passenger transportation.' The court erred in not deciding that the transportation by the Lehigh Valley Railroad Company, from which the said receipts were derived, was interstate transportation, and that the taxation of the receipts for such transportation was in violation of that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

4. The learned court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania and against the Lehigh Valley Railroad Company.

5. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

48 To the honorable the judges of the Supreme Court of the United States of America:

The petitioner prays for a reversal of the judgment entered against it in the supreme court of Pennsylvania for the reasons assigned above.

LEHIGH VALLEY RAILROAD COMPANY,
By its attorney, M. E. OLMSTED.

49 [Endorsed:] In U. S. Supreme Court. No. 1244. October term, 1889. Lehigh Valley Railroad Co. (plaintiff in error) *vs.* Commonwealth of Pennsylvania (defendant in error.) Assignments of error. M. E. Olmsted.

[Stamped:] Office Supreme Court U. S. Filed Sep. 24, 1889. James H. McKenney, clerk.

[Endorsed:] Lehigh Valley Railroad Co. *vs.* Commonwealth of Pennsylvania. No. 24. May term, 1889. Transcript of record.

Endorsed on cover: Case No. 13,651. Pennsylvania supreme court. No. 429. The Lehigh Valley Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed September 24, 1889.

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FILED.
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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

Nos. 275, 276, 428, AND 429,
OCTOBER TERM, 1891.

Lehigh Valley Railroad Company,

Plaintiff in Error,

vs.

Commonwealth of Pennsylvania.

FOUR WRITS OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

PAPER BOOK OF PLAINTIFF IN ERROR.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

Nos. 275, 276, 428, and 429, OCTOBER TERM, 1891.

LEHIGH VALLEY RAILROAD COMPANY,
Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA.

Four Writs of Error to the Supreme Court of Pennsylvania.

I.

STATEMENT OF THE CASES.

These four cases involve precisely the same question, and, for convenience, will be presented together.

The Lehigh Valley Railroad Company owns and operates an extensive inter-State system of railroads, but it is necessary to consider here only that portion of its main line extending from Mauch Chunk, in the anthracite coal regions of Pennsylvania, to Perth Amboy, New Jersey, a point near the city of New York.

At Phillipsburg, New Jersey, it is intersected by the Belvidere Delaware railroad, a part of the system operated by the Pennsylvania Railroad Company, connecting at Trenton, New Jersey, with the main line operated by that company between New York and Philadelphia. The Lehigh Valley Railroad Company transports freight and also passengers from Mauch

Chunk, Pennsylvania, to Phillipsburg, New Jersey, which coal and passengers are there taken upon the system of the Pennsylvania Railroad Company, and by it transported through New Jersey, via Trenton, back again into Pennsylvania and delivered at Philadelphia, the said transportation being continuous from Mauch Chunk to Philadelphia, the same trains, and frequently the same cars, transporting other freight and passengers from Mauch Chunk, destined to and delivered at various points in New Jersey. The only question to be determined here is whether, so far as the Lehigh Valley Railroad Company is concerned, the transportation by it of freight and passengers from Mauch Chunk to Phillipsburg, which freight and passengers are from there carried by the Pennsylvania Railroad Company to Philadelphia, is inter-State transportation. The question is raised in this way:

The Pennsylvania taxing statute approved June 7, 1879, (Laws of Pennsylvania, p. 112), in its seventh section, which is printed in full, beginning on page 6 hereof, imposes a tax of 8 mills upon the gross receipts of railroad, telegraph, express, &c., companies, so far as the said receipts are "for tolls and transportation, telegraph business or express business," the said tax to be paid semi-annually; and, for the purpose of ascertaining the amount of the tax, it is made the duty of the treasurer or other officer of each company to make report to the Auditor General. For the semi-annual periods ending respectively December 31, 1886, June 30, 1887, 1886, June 30, and December 31, 1887, the proper officer of the Lehigh Valley Railroad Company made returns to the Auditor General of Pennsylvania of the receipts of said company derived from transportation. In three of the cases the reports themselves, and in the other case an affidavit subsequently filed in court, divided these receipts into the following seven classes, viz:

1. Total receipts from transportation from points in Pennsylvania to other points in Pennsylvania, without passing out of the State.

2. Total receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but passing out of the State into other States and back again into Pennsylvania in course of transportation.

3. Total receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, after passing through the State of Pennsylvania.

4. Total receipts from transportation by continuous carriage from points in other States to points in Pennsylvania.

5. Total receipts from transportation by continuous carriage from points in Pennsylvania to points in other States.

6. Total receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania, and ending in a third State.

7. Total receipts from transportation from points in foreign States to other points in foreign States not touching Pennsylvania.

(See Record—No. 275, pp. 11 and 12; No. 276, p. 12; No. 428, p. 10; No. 429, p. 14.)

The Auditor General, however, disregarded these classifications, and charged tax upon that proportion of the entire transportation receipts which the number of miles operated in Pennsylvania bore to the entire number of miles of road operated by the company. From the accounts for tax thus "settled" by the Auditor General and approved by the State Treasurer, the company appealed, in each instance, to the court of common pleas of Dauphin county, as permitted by the laws of the State. That court declared the tax unconstitutional so far as it applied to receipts derived from inter-State commerce, and therefore refused to allow the Commonwealth to recover any tax upon classes 3, 4, 5, 6, and 7, but held the tax to be valid as to the receipts embraced in classes 1 and 2, claiming that the transportation therein referred to was not inter-State commerce.

In Nos. 275 and 276 both parties appealed to the Supreme Court of Pennsylvania, the company conceding its liability to taxation upon the receipts of class 1, but insisting that the transportation in class 2 was inter-State commerce; and the Commonwealth contending that the tax was valid even as to the inter-State transportation covered by the other classes which had been ruled out by the court below. In the Supreme Court of Pennsylvania the two appeals of the company and the two of the Commonwealth were argued together, with similar

appeals in the case of the *Commonwealth* vs. *Delaware & Hudson Canal Company*, and the judgments of the Dauphin county court were affirmed in the following opinion:

"*Per curiam*, October 1, 1888. We have examined with care the opinion of the learned judge who tried the above stated cases in the court below, and we are satisfied that the conclusions reached by him are correct. Nor do we deem it advisable to attempt to add anything to that which he has so well said. The judgments are severally affirmed."

These cases are reported in *1 Monaghan, Pennsylvania Supreme Court Cases, 36–48.* They are not reported in the official Pennsylvania State Reports.

In Nos. 428 and 429 the judgment of the Dauphin County Court was to the same effect. In these cases the Commonwealth took no appeal, but the company appealed, alleging the unconstitutionality of the tax as applied to class 2. The judgments were both affirmed by the Supreme Court of Pennsylvania in the following opinion:

"*Per curiam.* There is no essential difference in the facts of these two cases. They present the single question whether transportation from one point to another point in the same State is inter-State commerce for the reason that in the course of such transportation the property in question passes the boundaries of the State. The same point was before us last year in a proceeding between the same parties, and we determined it in favor of the Commonwealth. We adhere to the same ruling now, which will enable the cases to be reviewed by the Supreme Court of the United States, and our decision corrected if erroneous. The judgment in each case is affirmed." (See *129 Pennsylvania State Reports*, 308–313.)

Either before or after entering its appeal the company paid in each case all the taxes upon the receipts of class 1, and the cases here pending now involve only the taxation of the respective items of $207,660.42, $201,630.65, $122,833.05, and $177,016.02, receipts of class 2, for the semi-annual periods covered by cases Nos. 275, 276, 428 and 429, respectively. The cases were all heard by the trial court without a jury, the trial judge finding the facts as well the law. Concerning the receipts of class 2 the facts are thus found:

"So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburg, New Jersey, andthe receipts named were for that particular transportation; but the freight and passengers were there delivered upon the railroad of another company, to wit, the Belvidere Delaware Railroad Company, a line operated by the Pennsylvania Railroad Company upon which railroad it was carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to, hereto annexed, and marked Exhibit A. The transportation of freight was upon a joint way-bill of the Lehigh Valley and Pennsylvania Railroad companies, and this way-bill covered the whole transportation. A form is annexed, referred to and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad at the point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis—that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried. One-twentieth of the said receipts were derived from passenger transportation. . . . . The transportation was continuous from the point of beginning to the point of ending, and the freight and passengers were carried for a single sum or charge and upon a single way-bill or ticket." (See Record in No. 429, pp. 15 and 16).

(For form of passenger ticket, see leaf between pages 16 and 17 in No. 429; and for form of freight way-bill, see page 18).

It also appears that "some of the trains, and in many instances the same cars, which carried the freight and passengers indicated between points in Pennsylvania and the city of Philadelphia carried also freight and passengers destined and carried from points in Pennsylvania to points in New Jersey and New York, and *vice versa*." (See record in No. 275, middle of page 13).

As the State Courts concede the unconstitutionality of the

tax as applied to receipts derived from inter-State commerce, the only question to be determined here is whether or not the receipts of the Lehigh Valley Railroad Company for transporting from Mauch Chunk, Pa., to Phillipsburg, N. J., freight and passengers destined to be carried by continuous transportation to Philadelphia via Trenton, New Jersey, are or are not so derived from inter-State commerce. The distance traversed in New Jersey is a little over fifty-one miles.

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II.

ASSIGNMENT OF ERRORS IN No. 275.

1. The learned court erred in not sustaining the company's exception to the decision of the court below, viz:

"The court erred in including in the judgment in favor of the Commonwealth a tax upon $207,660.42, receipts for transporting freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit."

2. The learned court erred in not sustaining the company's exception to the decision of the court below, viz:

"The court erred in deciding that 'In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance, the commerce here is purely internal, whatever the mere form of it may be.'"

3. The learned court erred in not sustaining the company's exception to the decision of the court below, viz:

"The court erred in not deciding that the transportation, by continuous carriage, of freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit, was inter-State transportation, and that the taxation of the receipts for such transportation was in violation of that clause of the Constitution of the United

States which declares that Congress shall have power 'to regulate commerce with foreign nations and among the several States, and with the Indian tribes.'"

4. The learned court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania and against the Lehigh Valley Railroad Company.

5. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

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III.

ASSIGNMENT OF ERRORS IN No. 276.

1. The learned court erred in not sustaining the company's exception to the decision of the court below, viz:

"The court erred in including in the judgment in favor of the Commonwealth a tax upon $201,630.65, receipts for transporting freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit."

2. The learned court erred in not sustaining the company's exception to the decision of the court below, viz:

"The court erred in deciding that 'In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance, the commerce here is purely internal, whatever the mere form of it may be.'"

3. The learned court erred in not sustaining the company's exception to the decision of the court below, viz:

"The court erred in not deciding that the transportation, by continuous carriage, of freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit, was inter-State transportation, and that the taxation of the receipts for such transportation was in viola-

tion of that clause of the Constitution of the United States, which declares that Congress shall have power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

4. The learned court erred in affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against the Lehigh Valley Railroad Company.

5. The learned court erred in not reversing the judgment of the Court of Common Pleas of Dauphin County.

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IV.

ASSIGNMENT OF ERRORS IN No. 428.

1. The learned Court erred in not sustaining the company's first exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in including in the judgment directed to be entered in favor of the Comonwealth a tax upon the item of $122,833.05, being the receipts of the Lehigh Valley Railroad Company for transportation of freight and passengers from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, said freight and passengers having been carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey by way of Trenton, to Philadelphia, as stated in finding of fact No. 2, the taxation of receipts so derived being in violation of that clause of the Constitution of the United States which declares that Congress shall have power 'to regulate commerce with foreign nations, and among the several States and with the Indian tribes.'"

2. The learned Court erred in not sustaining the company's second exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in deciding relative to the item of $122,833.05, receipts of the Lehigh Valley Railroad Company for the transportation from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers carried by the Pennsylvania Railroad Company, from Phillipsburgh, through

the State of New Jersey, by way of Trenton, to Philadelphia, that 'In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be.'"

3. The learned Court erred in not sustaining the company's third exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"Having found as a fact that, concerning the item of $122,833.05, 'So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and the receipts named were for that particular transportation, but the freight and passengers were there delivered upon the railroad of another company, to wit: The Belvidere Delaware Railroad Co., a line operated by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements be tween these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia, and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to, hereto annexed, and marked Exhibit A. The transportation of freight was upon the joint way-bill of the Lehigh Valley and Pennsylvania Railroad Companies, and this way-bill covered the whole transportation. A form is annexed, referred to, and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment, and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis; that is to say, each company's share was in the proportion that the number of miles carried by it bore to the number of miles carried. One twentieth of the said receipts were derived from passenger transportation'—the Court erred in not deciding that the transportation, by the Lehigh Valley Railroad Company, from which the said receipts were derived, was inter-State transportation, and that the taxation of the receipts for such transportation was in violation of that clause of the Constitution of the United States which declares that Congress shall have power 'to regulate commerce

with foreign nations, and among the several States, and with the Indian tribes.'"

4. The learned Court erred in affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against the Lehigh Valley Railroad Company.

5. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Dauphin County.

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V.

ASSIGNMENT OF ERRORS IN No 429.

1. The learned Court erred in not sustaining the company's first exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"The court erred in including in the judgment directed to be entered in favor of the Commonwealth a tax upon the item of $177,016.02, being the receipts of the Lehigh Valley Railroad Company for transportation of freight and passengers from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, said freight and passengers having been carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, as stated in finding of fact No. 2, the taxation of receipts so derived being in violation of that clause of the Constitution of the United States which declares that Congress shall have power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.'"

2. The learned Court erred in not sustaining the company's second exception to the decision of the Court of Dauphin County, viz:

"The Court erred in deciding, relative to the item of $177,016.02, receipts of the Lehigh Valley Railroad Company for the transportation from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers carried by the

Pennsylvania Railroad Company, from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, that 'In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be.'"

3. The learned court erred in not sustaining the company's third exception to the decision of the court of common pleas of Dauphin county, viz :

"Having found as a fact that, concerning the item of $177,116.02, 'So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, and the receipts named were for that particular transportation. But the freight and passengers were there delivered upon the railroad of another company, to wit : the Belvidere Delaware Railroad Co., a line operated by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton, and thence by other lines of the Pennsylvania Railroad Company's system to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia, and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to, hereto annexed, and marked Exhibit A. The transportation of freight was upon the joint way-bill of the Lehigh Valley and Pennsylvania railroad companies, and this way-bill covered the whole transportation. A form is annexed, referred to, and marked Exhibit B. The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment, and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis ; that is to say, each company's share was in the proportion that the number of miles carried by it bore to the number of miles carried. One twentieth of the said receipts were derived from passenger transportation—' the Court erred in not deciding that the transportation by the Lehigh Valley Railroad Company, from which the said receipts were derived, was inter-State transportation, and that the taxation of the receipts for such transportation was in violation of that clause of the Consti-

tution of the United States which declares that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

4. The learned Court erred in affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against the Lehigh Valley Railroad Company.

5. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Dauphin County.

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VI.

SECTION 7 OF THE PENNSYLVANIA STATUTE OF JUNE 7, 1879.

SECTION 7. That every railroad company, canal company, pipe line company, conduit company, steamboat company, slack-water navigation company, transportation company, street passenger railway company, and every other company or limited patnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereinafter incorporated or organized by any other State, and doing business in this Commonwealth, and owning, operating, or leasing to or from another corporation, company, or limited partnership, any railroad, canal, pipe line, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, and every telegraph company incorporated under the laws of this or any other State and doing business in this Commonwealth, and every express company, and any palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the State Treasurer for the use of the Commonwealth a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business or express business; the said tax shall be paid semi-annually upon the last days of July and January in each year, the first pay-

ment to be due on the last day of July, Anno Domini one thousand eight hundred and seventy-nine; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of said company or limited partnership, to transmit to the Auditor General a statement, under oath or affirmation, of the amount of gross receipts of the said company or limited partnership derived from all sources during the preceding six months ending on the first days of July and January; and if any such company or limited partnership shall neglect or refuse, for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law from said companies or limited partnership: *Provided*, That whenever any corporation, company or limited partnership, liable to a tax on gross receipts under the provisions of this section, possesses and exercises the right to mine or purchase and sell coal, the receipts derived purely from the sale of coal so mined or purchased by said company or limited partnership shall not be taxed, but every such company or limited partnership shall keep an account of the said coal, and in the said account shall charge itself with the transportation thereof, at the same rates as are charged or would be charged by the said company or limited partnership for the transportation of similar freight for other companies or individuals, and the sums so charged for transportation shall be returned by the said company or limited partnership to the Auditor General, and shall be taxed as a part of the gross receipts of said company or limited partnership: *And provided further*, That in any case where the works of one corporation, company or limited partnership are leased to and operated by another corporation, company or limited partnership, the taxes imposed by this section shall be adjusted between the said corporations, companies or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company or limited

partnership operating the works, and upon payment by the said company or limited partnership of a tax upon the entire receipts derived from the operation thereof, the corporation, company or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental for the use of said works.

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VII.

EXTRACT FROM OPINION IN COM. *vs.* DELAWARE AND HUDSON CANAL CO., (REPORTED IN 21 W. N. C., 406; AFFIRMED BY SUPREME COURT OF PA., 1 MONAGHAN'S PA. SUPREME COURT CASES, 36; NOT REPORTED IN OFFICIAL STATE REPORTS,) REFERRED TO IN OPINION OF TRIAL JUDGES AS STATING REASONS FOR THE DECISION IN LEHIGH VALLEY CASES.

The fourth specification raises a question which we have been reluctant to entertain, and which nothing but a clear conviction of the present state of the law could bring us to consider. The argument which supports it is directly in the face of the *Railway Gross Receipts Case* in *15 Wall., 284*, decided by the Supreme Court of the United States in 1872, and *Phil. & S. M. S. Co.* vs. *Com. (104 Pa., 109;) Pullman P. C. Co.* vs. *Com. (107 id., 148,)* and *W. U. Tel. Co.* vs. *Com. (110 id., 405,)* decided by the Supreme Court of Pennsylvania. It is perhaps more correct to say that the argument chiefly attacks the case in 15 Wallace, for the Pennsylvania case rests upon that, and must stand or fall with it. If we had any doubt upon the subject we would be bound to give the Commonwealth the benefit thereof, and uphold the tax in suit, leaving it to the Supreme Court of the United States to choose its own occasion of saying plainly how much authority its own decision should continue to have. But if that court has already spoken, and has plainly limited or destroyed the force of its earlier opinion, we are bound by this action also in the sphere of federal law, and cannot refuse to follow, even if some of our own decisions are still formally in the way. That this is in fact the present sit-

uation, and that the case in 15 Wallace has been in effect overruled, carrying with it, of course, the cases in which our own court simply followed that decision, we are entirely satisfied, and we think a short review of the late authorities will make clear.

The *Railway Gross Receipts Case* was that of the Reading Railroad Company, a domestic corporation, and its receipts from all sources were held to be taxable by Pennsylvania for two reasons: First, because the receipts had passed into the general property of the company, and had thus lost their distinctive character as freight earned for transportation; and second, because the tax was held to be upon the company's franchise and to be only measured by the amount of its business as shown by its receipts. As the same court had just decided at the same term, in the *Freight Tax Case, 15 Wall., 232*, that a tax upon the freight or tonnage carried from one State into another was a regulation of commerce, and could not be imposed by the State of Pennsylvania, even upon a domestic corporation engaged in such carriage, it is not too much to say that the Gross Receipts decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that the decision must soon be overruled. Even at the first its force was much weakened by the strong dissent of three judges, but of course it bound all inferior courts, whatever their opinion of its reasoning might be, and it was followed here in the cases above cited.

Since 1872, however, several cases on this subject of inter-State commerce have been decided by the Supreme Court of the United States, in which the reasoning of the court opposed both the conclusion and the logic of the earlier decision, and finally, in *Fargo* vs. *Michigan, 121 U. S., 230*, the *Railway Gross Receipts Case* was taken up by name for consideration. This case was decided in April, 1887, while the last case on this subject was decided by the Supreme Court of Pennsylvania in June, 1885. Mr. Justice Miller easily and plainly distinguished the case in 15 Wall. from the case then before the court, and would naturally have then dismissed it without

further discussion if its authority had been still unquestioned; but he went on to say, with much significance, and with an evident reference to the facts of the earlier case: "The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business, or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, acquire the right to regulate that commerce either by taxation or in any other way." This was a sufficiently plain declaration that the second ground on which the tax rested in 15 Wall., viz: that it was a franchise tax, could not be maintained, if the receipts sought to be taxed were derived from inter-State commerce, and were taxed as receipts from transportation.

Fargo v. *Michigan* was followed at the same time by *Phil. & S. M. S. Co.* vs. *Com., 122 U. S., 326*, which was a case substantially identical in principle with the *Case of the Railway Gross Receipts*. In each the defendant was a Pennsylvania corporation, and in each the tax was imposed by Pennsylvania upon its gross receipts, including those derived from transportation between the State and points beyond its limits. The differences were, first, that one defendant was a railroad company and the other was a steamship company, this difference being immaterial since both were engaged in the business of transportation; and second, that the act of 1868 taxed the railroad company upon its gross receipts from all sources, while the act of 1877 taxed the steamship company only upon its gross receipts for tolls and transportation, telegraph business and express business, this, too, being immaterial from the present point of view.

The Commonwealth naturally argued that the case in 15

Wallace was controlling, and that no rational distincion could be drawn between that decision and the case of the steamship company then before the court. And, as we understand the opinion which was delivered by Mr. Justice Bradley, no serious effort is made to draw such a distinction. On the contrary he expressly declares, on page 342, that 'a review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable;' and, as the second and only other ground had already been declared not to be a good one in *Fargo* v. *Michigan*, the decision itself would seem to be left with scanty support. But Mr. Justice Bradley goes on to speak also of this second ground; and while he does not think that the tax imposed by the act of 1877 was a franchise tax, he says with emphasis: 'It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax upon the franchise of doing business, which in this case is the business of transportation in carrying on inter-State and foreign commerce, it would clearly be unconstitutional.' Further, speaking of the general subject of taxes upon inter-State commerce, he says on page 336: 'If, then, the commerce carried on by the plaintiff in error in this case could not constitutionally be taxed by the State, could the fares and freights received for carrying on that commerce be constitutionally taxed? If a State cannot tax the transportation may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you get for performing it." Such a position can hardly be said to be be based on a sound method of reasoning.'

If the cases thus referred to, with others therein cited, and the language quoted, do not completely overthrow the authority

of the *State Tax on Railway Gross Receipts*, we are at a loss to understand their meaning. Believing that they do, we think it our duty to disregard that decision, and to follow the later cases in holding that a statute which attempts to tax the gross receipts of transportation companies, derived, in the language of the act before us, from 'tolls and transportation, telegraph business or express business,' is not valid so far as such receipts are derived from commerce between points within and points without the State.

VIII.

OPINION IN COM. *v.* N. Y., L. E. & WEST. R. R. CO. (REPORTED IN 21 W. N. C., 410), REFERRED TO IN OPINIONS FILED BY TRIAL JUDGES AS GIVING REASONS FOR DECISION IN LEHIGH VALLEY CASES.

By the Court:

This case was tried without a jury, under the act of 1874. We find the facts to be as follows:

1. The defendant is a railroad company incorporated by the State of New York. Its main line runs from Jersey City, in the State of New Jersey, to Dunkirk, in the State of New York, passing through this Commonwealth. It also leases and operates certain lines of railroad belonging to other corporations, some of which lines lie wholly within the State of Pennsylvania, and some are only partly within. It is doing business in this Commonwealth, being engaged in the transportation of freight and passengers.

2. For the six months ending December 31, 1886, the gross receipts derived from the operation of that part of its various lines of railroad within the State of Penna. were $1,820,046.37. Of this amount, which was earned by the transportation of freight and passengers, $195,441 01 was received for transportation between points in Penna. without passing out of the State in the course of transit, $16,450.13 was received for transporting, by continuous carriage, freight and passengers from one point in Penna. to another point in Penna., which freight and passengers were carried out of the State and in again in course of transit, $271,213.68 was received for trans-

portation by continuous carriage from points in a foreign State to other points in the same State, passing through Penna. in course of transit, and $1,336,941.55 was received for transportation by continuous carriage from points in Penna. to points in other States, or from points in other States to points in Penna., or from points in a foreign State passing through Penna. to points in a third State.

3. The principal office and general treasury of the company are in the city of New York. The larger part of the said gross receipts was paid to it outside of Penna., and the part received in Penna. was remitted to New York from time to time by defendant's agents. No evidence was given from which the amounts received outside of Penna. could be found or properly distributed to the four classes named in paragraph 2. On Dec. 31, 1886, and also on March 31, 1887, when this account was settled, all the receipts taxed were physically in the city of New York.

4. This settlement taxes the entire sum of $1,820,046.37 for the six months ending Dec. 31, 1886, and is made under sec. 7 of the act of 1879, (P. L., 116.)

CONCLUSIONS OF LAW.

Most of the questions raised in this case have been discussed in *Com.* v. *D. & H. Can. Co., No. 534 June T., 1887, Daup. C. P.*, to which we now refer.

A new question arises here, however, which needs a short consideration. It is argued that the sum of $16,450.13 received for transportation by continuous carriage between points both of which are in Pennsylvania cannot be taxed because, during the transit, the goods and passengers were carried out of the State and in again. This, it was urged, makes the whole carriage inter-State commerce, and we were referred to several cases in support of the argument. None of them goes that length. In *Coe* v. *Errol, 116 U S., 517*, the Court remarks, in discussing another question, that New Hampshire could not tax logs which were started in Maine destined for another point in the same State, were floated down the Androscoggin river into New Hampshire, and were there temporarily

detained. Treating this as a decision, however—and we do not deny its correctness—it is not in point. If the Court had decided that Maine could not tax the logs because they had passed through New Hampshire, the case would be like the one before us. *Lord* v. *S. S. Co.*, *102 U. S.*, *541*, simply held that a steamship plying upon the Pacific ocean between two ports of California was engaged in commerce with foreign nations so as to be subject to the regulating power of Congress; the reason being, that she was navigating the high seas, on the common highway of nations, where the United States was responsible for her conduct and owed her protection. The question of California's power to tax the steamship's receipts was in no way involved or considered.

In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be; the freight and passengers start from a point in Penna. destined for another point in Penna., and are carried to their destination by continuous transit. Does this become inter-State commerce merely because the railroad curves for a few miles into another State, and then curves back into Penna.? If it does, we reach the somewhat surprising conclusion that the State of New York cannot tax the defendant's receipts for transportation between the cities of New York and Buffalo, simply because the cars are hauled over a few miles of rails within the State of Penna.; and also that, merely to cross the Delaware river and then cross back a mile or two beyond would make any railroad corporation of Penna. or New Jersey an inter-State carrier as to all traffic which passed over the two bridges. So, too, the receipts of a steamboat plying between two ports in the State of Ohio along the Ohio river would be free from taxation by that State if the channel carried her for a few moments only into the State of Kentucky. We do not believe this to be the law, and accordingly hold that the defendant is taxable upon the item of $16,450.13 above named, as being receipts from internal commerce only.

It is also taxable upon the sum of $195,441.01, but not upon any of the other sums above set out.

The amount due the Commonwealth is as follows:

1/10 of 1 per cent. upon $195,441 01		
16,450 13		
	$211,891 14,	$1,695 12
Int. from May 30, '87, to April 2, '88, ...		171 20
Att'y Gen'l's Com'n, ...		84 75
Total, ...		$1,851 09

For which sum we direct judgment to be entered if exceptions are not filed according to law.

JOHN B MCPHERSON,
A. L. J.

IX.

ARGUMENT.

The seventh section of the Pennsylvania revenue statute of June 7, 1879, which has since been repealed, was three times before this court, and, in each instance, condemned as unconstitutional in so far as it imposed a tax upon receipts derived from inter-State commerce. In *Phila. & Southern Steamship Co.* vs. *Pennsylvania, 122 U. S., 326*, this court unanimously declared the tax invalid as applied to gross receipts of a steamship company derived from transportation of persons or property by sea between different States and to and from foreign countries; Mr. Justice Bradley, who delivered the unanimous opinion of this court, saying (pp. 341–342):

"The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money or its value, but because they are received for transportation. No doubt a ship owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of inter-State or foreign commerce, no matter when the tax is enacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."

In *Western Union Telegraph Co.* vs. *Pennsylvania, 128 U. S., 39,* Mr. Chief Justice Fuller delivering the opinion, this court again unanimously declared, following *Telegraph Co.* vs. *Texas, 105 U. S., 460,* and *Ratterman* vs. *Western Union Telegraph Co., 127 U. S., 411,* that the tax imposed upon receipts from telegraphic messages sent inter-State was unconstitutional, and that "The Commonwealth was not entitled to recover for the taxes in question, excepting in respect to the messages transmitted *wholly within the State.*"

In *Pullman's Palace Car Company* vs. *Pennsylvania, 131 U. S., 444,* the learned Attorney General conceded the unconstitutionality of this tax as applied to receipts derived from the transportation of passengers inter-State, by rail, in Pullman cars; and a stipulation was filed agreeing that the judgment of the Supreme Court of Pennsylvania should be reversed, with costs.

In obedience to the above mentioned decisions of this court, the Supreme Court of Pennsylvania afterwards, in these pending four cases, as well as in the others referred to in the opinions of the trial judge, declared the tax unconstitutional, and limited the recovery by the Commonwealth to the taxes upon such items of receipts as the court construed to have been received from transportation not inter-State.

Following upon these decisions, the Legislature of Pennsylvania passed a new revenue act, approved June 1, 1889, (Laws of Pennsylvania, 420), repealing the seventh section of the act of June 7, 1879, under which the tax in controversy is claimed; and, in its twenty-third section, re-enacting the tax and confining it specifically to receipts "received from passengers and freight traffic transported wholly within this State." In repealing the former act, however, there was reserved to the Commonwealth the right to collect any taxes accrued under the act of 1879. The decision of this court will, therefore, not affect the present revenue system of the Commonwealth, but only the taxes of this one company

upon its receipts from a single source prior to the passage of the act of June 1, 1889.

As will appear from the record, the State court concedes the invalidity of the tax in question as applied to receipts from inter-State commerce; but it holds that the receipts of the Lehigh Valley Railroad Company for transportation from Mauch Chunk, Pa., to Phillipsburg, New Jersey, of freight and passengers, which, at Phillipsburg, were taken upon the system of the Pennsylvania Railroad Company and by it transported more than fifty miles through the State of New Jersey to Trenton, and from there back again into Pennsylvania for ultimate delivery at Philadelphia, to which point the transportation from Mauch Chunk was, by agreement between the companies, continuous, is not inter-State commerce. The company contends that it is, and that is the only question in dispute.

So far as the Lehigh Valley Railroad Company was concerned, the transportation began in Pennsylvania and ended in New Jersey, and the receipts sought to be taxed are receipts derived by the company from that transportation beginning in Pennsylvania and ending in New Jersey.

So far as the Pennsylvania Railroad Company was concerned, the transportation began in New Jersey and by it was conducted for more than fifty miles in that State, and finally ended in Pennsylvania.

Was this transportation *intra*-State or was it *inter*-State? If, as the company contends, it was inter-State transportation, it was inter-State commerce; for this court has often decided that transportation is not merely an aid to, or an instrument of, commerce, but is itself commerce. Said Mr. Justice Wayne in *The Passenger Cases, 7 Howard, 283–416*, quoting from Martens in his Summary of the Law of Nations:

"It (commerce between nations or among States) consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another, or *transporting the merchandise from the sellers to the buyers to gain the freight.*"

This language is cited approvingly in the *Case of the State Freight Tax, 15 Wallace, 232–275*, by Mr. Justice Strong, who adds:

"Nor does it make any difference whether this interchange of commodities is by land or by water. In either case *the bringing of the goods from the seller to the buyer is commerce.* Among the States it must have been principally by land when the Constitution was adopted."

In the case of *State Tax on Railway Gross Receipts, 15 Wallace, 284–299*, Mr. Justice Miller said:

"*The business of roads and canals, namely, transportation of persons and property, is itself commerce.* So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise, but that which carries goods from or to another State is exempted by the Constitution from its control."

This was a dissenting opinion, but the difference between the members of this Court was not as to the proposition involved in the words italicised; and, in any event, the opinion of the minority of the Court in this case became, subsequently, the opinion of the entire court in *Fargo* vs. *Michigan, 121 U. S., 230; Philadelphia and Southern Mail S. S. Co., 122 U. S., 326*; and the other cases above cited.

In *Fargo* vs. *Michigan, 121 U. S., 230–247*, Mr. Justice Miller, delivering the opinion of the Court, declared that, in *Wabash Railway Co.* vs. *Illinois, 118 U. S., 557*, it had been held

"That the carriage of passengers or freight between different points is commerce, and except where that is wholly and exclusively within the limits of a State, it is not subject in its material features to be regulated by the State legislature."

In *Telegraph Co.* vs. *Texas, 105 U. S., 460–464*, Mr. Chief Justice Waite, delivering the unanimous opinion of the Court, said:

"A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and *their business is commerce itself.*"

In short, in a very long line of cases, which are too familiar to require citation, this Court has always and invariably proceeded upon the theory that transportation is commerce; and, wherever the transportation involved has been of an inter-State or international character, its regulation by the States has been invariably prohibited; and the only transportation which the States have been permitted to control or regulate is that which is completely internal, and does not in any way affect or concern any other State. Deady, J., who delivered the opinion of the circuit court in *Ex parte Koehler, Receiver, &c., 30 Am. & Eng. R. R. Cases, 71–74,* declares that "Any carriage of goods which crosses a State line is inter-State commerce."

In the very able article on inter-State commerce, in 11 Am. & Eng. Encyclopedia of Law, 539, the following is given as the definition of that term, viz: "Inter-state commerce, or commerce 'among the several States' of the American Union, is commerce which concerns more States than one;" and numerous decisions of this court are there cited sustaining that definition. And this declaration is in entire harmony with the rulings of this court.

In *Gibbons* vs. *Ogden, 9 Wheat., 1,* Mr. Justice Marshall, who delivered the opinion of the court, discussing the commerce clause of the Constitution, said (p. 193):

"The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'"

And again, after discussing the power of Congress to regulate commerce with foreign nations, he says (p. 194):

"The subject to which the power is next applied is to commerce 'among the several States.' The word 'among' means 'intermingled with.' A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce, which is *completely internal*, which is carried on between man and man in a State, or between different parts of the same State, *and which does not extend to or affect other States*. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

On page 189, the learned Chief Justice says:

"Commerce undoubtedly is traffic, but it is something more; it is intercourse."

In the so-called *State Tonnage Tax Cases, 12 Wallace, 204*, Mr. Justice Clifford, delivering the opinion of this Court, said (p. 214):

"Congress possesses the power to regulate commerce with foreign nations and among the several States, and it is well settled law that the word 'commerce,' as used in the Constitution, comprehends navigation, and that it extends to every species of commercial intercourse between the United States and foreign nations and to all commerce in the several States, *except such as is completely internal and which does not extend to or affect other States.*"

And again, in *Hall* vs. *DeCuir*, *95 U. S.*, *485*, the same learned justice, who delivered a separate concurring opinion, said (p. 491):

"Power to regulate commerce is, by the Constitution, vested in Congress; and it is well settled law that the word 'commerce,' as used in the Constitution, comprehends navigation, which extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several States, *except such as is completely internal, and which does not extend to or affect other States.*"

Mr. Justice McLean, who delivered an opinion in *The Passenger Cases*, *7 Howard*, *283*, said:

"Commerce is defined to be 'an exchange of commodities;' but this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is a part of commerce is not now an open question."

In the same opinion he says:

"All commercial action within the limits of a State and which does not extend to any other State or foreign country, is exclusively under State regulation;" but holds that, "Commercial action which is not completely within the limits of a State is subject to the exclusive power of Congress to regulate."

In *Fargo* vs. *Michigan*, *121 U. S.*, *230*, it was decided, as stated in the syllabus, that

"A State statute which levies a tax upon the gross receipts

of railroads for the carriage of freights and passengers into, out of or through the State, is a tax upon commerce among the States, and therefore void."

In the *Case of the State Freight Tax, supra*, it was decided that a tax upon the transportation of passengers or merchandise through a State was exclusively within the regulation and control of Congress, and therefore not subject to State legislation.

In *Wabash, St. Louis and Pacific R'y Co.* vs. *Illinois, 118 U. S., 557*, the commerce which may be subject to State regulation is declared to be "commerce wholly within the State," and it is said that this Court has always recognized the "distinction between commerce among the States and the other class of commerce between the citizens of a single State and conducted within its limits exclusively." In that case it was held that the State of Illinois could not regulate the charges to be made for the transportation, between different points within the State, of goods to be delivered beyond the limits of the State. And it is stated in the syllabus that

> "This court holds further that such a transportation is 'commerce among the States,' even as to that part of the voyage which lies within the State of Illinois, while it is not denied that there may be a transportation of goods which is begun and ended within its limits, and *disconnected with any carriage outside of the State*, which is not commerce among the States."

It is clear that, under the cases cited, the State of New Jersey cannot interfere with this transportation in any way, because the freight and passengers are carried through that State, and the transportation is, therefore, inter-State commerce. But if it is inter-State commerce as to New Jersey, is it not also inter-State commerce as to Pennsylvania? True, it begins and ends in that State, but it is not wholly conducted within that State. It is not completely internal. It does concern and affect another

ducted without passing, for more than fifty miles, over the soil of another State.

In *Coe* vs. *Errol*, *116 U. S.*, *517*, a quantity of logs had been cut in the State of Maine and put into the Androscoggin river for the purpose of floating them down to Lewiston, in the same State. The Androscoggin river starts in Maine, but, after running a distance through that State, crosses the line and runs a distance through the State of New Hampshire, and then back again into the State of Maine. It was customary to leave the logs at the town of Errol, in New Hampshire, for one year. Other logs were cut in New Hampshire and drawn down to Errol to be floated also to the State of Maine. The taxing authorities taxed all these logs at Errol. The Supreme Court of New Hampshire decided that, as to the logs cut in Maine, which were simply interrupted in their passage through New Hampshire, although they lay there a year, they were in course of inter-State transportation, and that, too, although the beginning and ending of the transportation was in the same State; but that, as to logs cut in New Hampshire, although they were intended to be shipped to another State, yet, as they had not actually started in course of transportation, they were taxable. Those cut in Maine, and intended to pass through New Hampshire to another point in Maine, were declared to be exempt from taxation as being in course of inter-State transportation. The Supreme Court of the United States sustained that position. As stated in the syllabus:

"Goods on their way through a State from a place outside thereof to another place outside thereof, are in course of inter-State or foreign transportation, and are subjects of inter-State or foreign commerce, and not taxable by the State through which they are passing, even though detained within that State by low water or other temporary cause."

And in the opinion, in reference to these logs it is said:

"Such goods are already in the course of commercial

transportation, and are clearly under the protection of the Constitution."

This declaration of the law, it must be remembered, is made in reference to property whose transportation commenced in Maine and ended in the same State, after passing through New Hampshire. The learned judge of the Court of Common Pleas of Dauphin county holds that this decision is not in point. "If," he says, "the Court had decided that *Maine* could not tax the logs because they had passed through New Hampshire, the case would be like the one before us." But where is the distinction? The Court held that New Hampshire could not tax the logs because they were in course of inter-State transportation which is inter-State commerce. Their transportation being inter-State commerce, one State could not tax them any more than the other. Doubtless while they were property in the State of Maine, and before the transportation had commenced, they might have been taxed as other property in that State; or after the transportation had ended in Maine, and they had become again mingled with the property of the State, they might have been taxed as other property; but it seems very clear that an attempt to tax the transportation of those logs, or to tax them in any way, because of that transportation, would have been just as much forbidden to the State of Maine as to the State of New Hampshire. The point is that the transportation from a point in Maine, passing through the State of New Hampshire to another point in Maine, was held by this Court to be inter-State transportation, and, as such, exempt from State taxation.

In the reported cases it is invariably held that the only commerce which a State has any authority to regulate is that which is wholly within her own borders.

In *Lord* vs. *Steamship Company, 102 U. S., 541*, the steamship "Ventura" was employed in navigation between San

Francisco and San Diego, both in the State of California, touching also at intermediate ports on the coast in said State. She neither took on nor put off goods outside of the State of California, but in making her voyage passed out upon the Pacific ocean, out of the State of California and in again. As stated by Mr. Chief Justice Waite, who delivered the opinion (p. 543):

"The single question presented by the assignment of errors is whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages."

That question was decided in the affirmative, and it was held that the "Ventura" on her voyage "entered on a navigation which was necessarily connected with other nations," and that, although she was not trading with them,

"She was navigating with them, and consequently with them was engaged in commerce. * * * In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

If a vessel while destined from a port in one State to another port in the same State is, while sailing upon waters outside of that State, and open to the common use of all nations, to be treated as engaged in commerce with foreign nations, certainly transportation which, though beginning and ending in the same State, is partly effected outside of the limits of that State, and upon the soil of another State, cannot be treated as anything else than commerce among States. And if, when the steamship "Ventura" passed out of the State of California on to the common ground of nations, upon the high seas, she was engaged in commerce with for-

eign nations, certainly when the cars of the Lehigh Valley Railroad Company passed out of the State of Pennsylvania into the State of New Jersey, they must be held to be engaged in commerce among the States, even though they pass back again into Pennsylvania. Such transportation is not confined exclusively to the jurisdiction and territory of the State of Pennsylvania. It does affect other States.

That commerce which the Constitution leaves to the States to regulate is thus defined in the same opinion (page 543):

"Congress has power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes' (Const. Art. I, sect. 8); but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are *confined exclusively to the jurisdiction and territory of that State*, and do not affect other nations or States or the Indian tribes."

The learned Chief Justice there held that the case then in hand was not within that class, because "The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego, by the way of the Pacific ocean. They could not be performed except by going not only out of California, but out of the United States as well," and therefore the business constituted commerce with foreign nations. The Lehigh Valley Railroad Company and Pennsylvania Railroad Company jointly contract to carry coal from Mauch Chunk to Philadelphia by the way of Phillipsburg. They cannot perform those contracts without going outside of the jurisdiction of the State of Pennsylvania. The transportation is not "confined exclusively to the jurisdiction and territory of that State." It does "affect other nations or States." This transportation is not, therefore, of the class over which, as this Court held, the States have control, but is within the class over which Congress has exclusive jurisdiction. In the same opin-

ion the language of Mr. Justice Daniel, in *Veazie* vs. *Moor*, *14 Howard, 568*, is approvingly cited, wherein he said:

"Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations—transactions which either immediately or at some stage of their progress must be extra-territorial."

By this same reasoning, "commerce among the several States" must signify something necessarily connected with more than one State—"transactions which either immediately or at some stage of their progress must be extra-territorial." The transportation in this case is at certain stages of its progress—for about one half of its entire distance—extra-territorial, so far as Pennsylvania is concerned. *Lord* vs. *Steamship Co., supra*, is decisive of this case. The Constitution says: "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States." If this confers power to regulate transportation between two points in California, because partly effected outside of the State, it must also confer power to regulate transportation between two points in Pennsylvania which is effected partly in another State. In one case the transportation was upon the high seas, in the other upon foreign soil. There is no distinction in principle.

It appears also in the evidence that the same trains and the same cars which carry the freight and passengers from Mauch Chunk to Philadelphia, by way of New Jersey, carry also freight and passengers destined and carried from points in Pennsylvania to points in other States, and from points in other States to points in Pennsylvania. Nobody pretends that such transportation is not inter-State commerce. But if the State may tax the persons and property in those cars, which are destined to Philadelphia, it has the power to impose *embarrassing restrictions* upon what is admittedly inter-State transportation conducted in the same cars, which brings this case within the reasoning of *Hall* vs. *DeCuir*, *95 U. S., 485*, in which a Louisiana statute, which, as construed by the Su-

preme Court of that State, required the "Governor Allen," a steamboat plying on the Mississippi river, to accord, while in the State of Louisianna, equal rights and privileges to passengers in all parts of the vessel, without distinction on account of color, and subjected to an action for damages the owner of the vessel, who had excluded colored passengers on account of their race or color from the cabins set apart for the use of the whites during the voyage, was held to be unconstitutional even as applied to passengers taken up and put down in the State. Mr. Chief Justice Waite, who delivered the opinion of the Court, said (p. 489):

"While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

So here, a regulation of the transportation of the Lehigh Valley railroad must necessarily affect not only the transportation between Mauch Chunk and Philadelphia, which passes through New Jersey, but also transportation in the same cars between points in Pennsylvania and points in other States.

If the State of Pennsylvania can tax any portion of this traffic, so also can the State of New Jersey. It can tax to any extent it may deem proper. It can virtually, by taxation, exclude the company from transporting passengers through that State at all. The State of New Jersey might stop the transportation from Mauch Chunk to Philadelphia. It is conceded by the State courts that this is inter-State commerce so far as New Jersey is concerned. In the case of the

N. Y., L. E. & W. R. R. Co. it was found as a fact that $271,213 68 of receipts were derived from transportation from a point in a foreign State, passing through Pennsylvania, to another point in the same State, yet that class was found to be not taxable, (see pp. 12 and 14 hereof). How can transportation through two States be inter-State as to one and not as to the other?

In *Pacific Coast Steamship Co.* vs. *Board of Railroad Commissioners, 18 Fed. Rep., 10*, the Circuit Court of the United States for the district of California decided, as stated in the syllabus, that

"The State Board of Railroad Commissioners has no power to regulate or interfere with the transportation of persons or merchandise, by a steamship company, between ports within the State, if they be in transit to or from other States, or when in navigating the ocean the vessel goes beyond a marine league from the shore. This power has been conferred upon Congress, and is exclusive."

The steamships in that case were engaged in the coast trade, making voyages between ports in California, and also extending their voyages to ports in other States and territories. Mr. Justice Field, who delivered the opinion, after showing that the power to regulate commerce with foreign nations and among the several States is exclusively in Congress, says (p. 12, 13):

"With respect to purely domestic commerce carried on by these vessels, the commissioners possess all the authority which the State can confer. But when can the vessels in carrying persons and merchandise between different ports in the State be held to be engaged in commerce purely domestic? for there is a commerce within the State which does not come within that designation. We answer that they are not so engaged when they take up persons or merchandise to carry to a destination within the State from a place without it, or they take up persons or merchandise in the State to carry to a place without its limits. . . . . *Nor are the vessels engaged in purely domestic commerce when their voyages between ports of the same State require them to navigate*

the ocean. When they go beyond the marine league they pass out of the jurisdiction of the State, and come under the exclusive control of Congress. To bring the transportation within control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State. Lord vs. *Steamship Co., 102 U. S., 541.*

"If the steamships of the plaintiff carried any persons or merchandise between ports of the State, not going out, on their voyage between those ports, of the jurisdiction of the State, and the persons or merchandise carried not coming from any other State or a foreign country, or going to another State or country, the transportation commencing and ending in the State, then to that extent they would be engaged in commerce purely domestic, and to that extent the railroad commissioners might have jurisdiction to regulate the fares and freights for transportation on the vessels. But it is conceded by the pleadings that in every voyage made by the vessels between ports of the State,—that is between San Francisco and such ports along the coast,—they pass out upon the ocean beyond a marine league from the shore. They are, therefore, engaged in no transportation which the commissioners can regulate."

The learned judge of the trial court, discussing *Lord* vs. *Steamship Co., supra*, says: "The question of California's power to tax the steamship's receipts was in no way involved or considered." True, no question of taxation was directly involved, but the Court did expressly decide that the transportation in question between two different ports both within the State of California was subject to regulation by Congress, and that the power of regulation, as has been many times decided, is exclusively in Congress and is denied to the States. It therefore follows that the States cannot regulate in any way. That the regulation here attempted is by means of taxation does not affect the principle. That kind of regulation is just as much prohibited as any other. As was said by Mr. Justice Bradley in *Steamship Co.* vs. *Pennsylvania, 122 U. S., 326–336:*

"But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either

by its tonnage or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to inter-State commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and that its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system."

Nor does it make any difference that, as suggested by the learned trial judge, the distance of transportation in another State may be very short. In the cases at bar the distance was not short. The transportation through New Jersey was for more than fifty miles; but had it been for a much less distance, the principle would have been the same. In *Pennsylvania* vs. *Gloucester Ferry Company, 114 U. S., 196*, this Court unanimously condemned the Pennsylvania taxing statute upon the ground that, as stated in the syllabus:

"The transportation of passengers and freight for hire by a steam ferry across the Delaware river from New Jersey to Philadelphia by a corporation of New Jersey is inter-State commerce, which is not subject to exactions by the State of Pennsylvania."

The transportation was simply across the comparatively narrow river between Philadelphia and Camden, which cities are within sight of each other. Speaking of the State, Mr. Justice Field, who delivered the opinion of the Court in that case, said (p. 218):

"However great her power, no legislation on her part can impose a tax on that portion of inter-State commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

Since the first of the four cases now under discussion was decided by the Pennsylvania courts, three courts, whose opinions are entitled to consideration, have reached a different conclusion. In *Sternberger* vs. *Cape Fear and Yadkin Valley Railroad Company, 35 Am. and Eng. R. R. Cases. 693*, the Supreme Court of South Carolina, in an opinion filed October 30, 1888, by Simpson, C. J., decided that the transportation of freight from Charleston, S. C., to Tatum, in the same State, over a route partly in another State, was inter-State commerce, and upon that ground denied the jurisdiction of the railroad commission of South Carolina to regulate it.

In *N. O. Cotton Exchange* vs. *Cinn., N. O. and Texas Pacific R'y Co. et. al., 2 Inter-St. Com. Reports, 289*, one of the most important cases before the Inter-State Commerce Commission, that body in a very elaborate opinion filed November 26, 1888, held that

"Commerce between points in the same State, but which, in being carried from one place to the other, passes through another State, is inter-State commerce and subject to regulation by the provisions of the Act to Regulate Commerce."

In *State* vs. *Chicago, St. P. M. & O. R'y Co., 40 Minn., 267*, which is the very latest case upon the subject, the Supreme Court of Minnesota, in an opinion filed March 18, 1889, decided that transportation between Duluth and Mankato, both points being within the State of Minnesota, but over a line of railroad extending out of Minnesota into Wisconsin and back again into Minnesota, was inter-State commerce, and as such subject to the exclusive regulation of Congress, and not subject to the jurisdiction of the State Railroad Commission. In the course of the opinion filed by Dickinson J., after citing numerous authorities, he says:

"In view of the above decisions of the Supreme Court of the United States, that the transportation of freight by a common carrier apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of 'commerce,' to which the Constitution applies, it is not a matter of controlling importance that the

consignor and the consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State. * * * * The question under consideration has not come before the Supreme Court of the United States in the form here presented; but it seems to us that that Court has so determined the construction and effect of the commerce clause in the Constitution, that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the Constitution, and that the authority of Congress is exclusive as respects the regulation of rates for inter-State commerce.

"In *Lord* vs. *Goodall N. & P. Steamship Co., 102 U. S., 541*, the question presented for decision was whether Congress had the power to regulate the liability (to the owners of goods lost in the course of transportation) of the owners of vessels engaged only in transportation between different ports in the same State (California), the voyage between such ports being in part upon the high seas, and out of the limits of the State. The court recognized the fact that Congress had no power to thus interfere with the exclusively internal commerce of a State, and that the law of Congress (restricting the common law liability of carriers) could be sustained in its application to this case only in case the transportation in question should be deemed to be within the clause of the Constitution empowering Congress 'to regulate commerce with foreign nations and among the several States.' It was decided that such transportation was included in 'commerce with foreign nations,' a matter of 'external concern,' as respected the State of California, and subject to the regulating power of Congress. If such transportation from San Francisco to San Diego, in the same State, was 'foreign' commerce (transportation) within the meaning of the Constitution, because the voyage was for the most part upon the high seas, the common highway of nations, is not the transportation from Duluth to Mankato, by a route which for the most part is wholly within the territory of Wisconsin, commerce (transportation), 'among the several States?' Has not the State of Wisconsin at least as much interest and as large a jurisdiction concerning the transit of goods by carrier across its territory as have the nations of the world, including our own, in the

voyage merely from port to port in the State of California? How can the one be deemed foreign and the other exclusively internal, as respects the State of Minnesota? We are unable to make any distinction, and it seems to us that our decisions must be controlled by that above cited. *Pacific Coast Steamship Co.* vs. *Board of Railroad Commissioners, 9 Sawy., 253, 18 Fed. Rep., 10,* was like that last cited, except that the question related to the power of the State authorities of California to regulate rates of transportation upon steam vessels between various ports in the State. That authority was denied for the reason that it was not domestic commerce, the vessels in the course of the voyage going out to sea more than a league from land. Field, J., wrote the opinion of the circuit court.

"A case closely analogous to that under consideration was very recently decided by the Supreme Court of South Carolina, in *Sternberger* v. *Cape Fear & Y. V. Railroad Co., 7 S. E. Rep., 836.* The defendant was charged with violating the statute of that State which forbids a higher charge for a shorter than for a longer carriage. The property had been shipped from Charleston to Tatum, both places being within that State. The course of transit from Charleston was, first, over two railroads wholly within the State; then to a point in North Carolina, over a road operated in both States; then for some distance within North Carolina, over a road wholly within that State; then it was received in North Carolina by the defendant road, which was operated in both States, and transported to its destination at Tatum. The charge exacted for the entire distance was $4.40, while the freight to a point six miles further would have been only $4. It was held that the railroad commission of South Carolina had no jurisdiction to fix rates for such transportation, nor does the decision seem to rest entirely upon the fact that one of the roads in this route was wholly in North Carolina. That fact, as we think, should not have affected the result.

"The Inter-State Commerce Commission has recently (November, 1888,) ruled upon the question here presented, holding that commerce between points in the same State, but which, in being carried from one place to the other, passes through another State, is inter-State commerce, subject to Congressional regulation. *New Orleans Cotton Exchange* vs. *C., N. O. & T. P. Railway Co., 2 Inter-State Comm. R., 375.* We are aware that the Supreme Court of Pennsyl-

vania has held to the contrary. *Coal* vs. *Lehigh Valley Railroad Co., 17 Atl. Rep., 179.* If those cases were wholly analogous to that before us, that court has not regarded the decision of the court of last resort in such cases, in *Lord* vs. *Steamship Co., supra*, as having the effect which we think must be accorded to it."

It is respectfully submitted that the decisions, upon this point, of the Inter-State Commerce Commission and of the Supreme Courts of South Carolina and Minnesota, are correct, being in harmony with the decision of this court in *Lord* vs. *Steamship Co., supra*, and of Mr. Justice Field in *Steamship Co.* vs. *Board, supra*; that the transportation in question by plaintiff in error between Mauch Chunk, Pa., and Phillipsburg, N. J., was inter-State commerce, although the freight and passengers thus transported were, after having been carried on the Pennsylvania Railroad more than fifty miles through New Jersey, finally delivered at Philadelphia and that, therefore, the judgment of the Supreme Court of Pennsylvania, in each of these four cases, is in violation of the commerce clause of the Constitution, and must be reversed.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

NOS. 275, 276, 428, AND 492,
OCTOBER TERM, 1891.

Lehigh Valley Railroad Company,

Plaintiff in Error,

vs.

Commonwealth of Pennsylvania.

FOUR WRITS OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

PAPER BOOK OF DEFENDANT IN ERROR.

JAMES A. STRANAHAN,
Deputy Attorney General.

W. U. HENSEL,
Attorney General.

In the Supreme Court of the United States.

Nos. 275, 276, 428 and 429, OCTOBER TERM, 1891.

LEHIGH VALLEY RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

Four Writs of Error to the Supreme Court of Pennsylvania.

STATEMENT OF FACTS BY DEFENDANT IN ERROR.

The Lehigh Valley Railroad Company is a Pennsylvania corporation. It owns, controls and operates an extensive system of railroads in the State of Pennsylvania. The lines and branches of railroads controlled and operated by it transport a large percentage of the anthracite coal production of the state. Besides it transports a large amount of other freight and merchandise, and is also largely concerned in passenger traffic. From the State of New Jersey it has a main line of railroad to Mauch Chunk. From Mauch Chunk its lines branch out into different directions into the anthracite coal regions of Pennsylvania.

The Lehigh Valley Railroad Company has no line of its own to Philadelphia and for the traffic from Mauch Chunk to Philadelphia it has the choice of at least two routes, one by the way of the Philadelphia and Reading Railroad Company, direct to

Philadelphia, from Bethlehem by a route all the way in the State of Pennsylvania, the other by the Pennsylvania Railroad connecting at Phillipsburg and thence to Trenton in the State of New Jersey, and from Trenton to Philadelphia, in the State of Pennsylvania.

The route by the way of the Philadelphia and Reading road is the more direct and shorter of the two routes. The passenger traffic of the Lehigh Valley Railroad Company to Philadelphia from Mauch Chunk and other points in the anthracite regions in Pennsylvania is almost wholly taken over the Philadelphia and Reading road. This will appear from the detailed reports of its receipts from the several sources.

In its coal or general freight traffic, for whatever reasons, it has possibly made better traffic arrangements with the Pennsylvania Railroad Company than it could with the Philadelphia and Reading; but for passenger traffic it was the reverse. This is why the freight goes in one direction and the passengers in the other. But for it all the traffic legitimately belongs to Pennsylvania and the diversion of it, by arrangements between contending and competing companies, both of which are Pennsylvania corporations, ought not to change its character as state transportation and make it interstate commerce and thus relieve this company from its proportionate share of taxation in this state. This transportation is all between terminals in the State of Pennsylvania and in no way affects the State of New Jersey as the receipts taxed are only for transportation in the State of Pennsylvania.

ARGUMENT OF DEFENDANT IN ERROR.

I.

We will consider the question presented in these several cases in two propositions:

The receipts from transportation are wholly from traffic within the state.

The returns for the semi-annual periods ending respectively June 30, 1886, December 31, 1886, June 30, 1887, and December 31, 1887, made by the Lehigh Valley Railroad Company to the Auditor General of Pennsylvania, for the purposes of taxation, so far as the questions involved in this case are concerned, are as follows:

"2. Total receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania but passing out of the state into other states and back again into Pennsylvania in course of transportation."

Coupled with this return we refer to the affidavit of William C. Alderson, treasurer of the company, submitted to, and considered in evidence by the Dauphin county court in the trial of the case. We quote the concluding sentence of the third paragraph of this affidavit.

"So far as the Lehigh Valley Railroad line is concerned, the transportation is from Mauch Chunk, or the other points in Pennsylvania, to Phillipsburg, in New Jersey, but by arrangements between this company and the corporations owning the other roads, the transportation is continuous from Mauch Chunk, and the other points in Pennsylvania to Philadelphia."

From this affidavit, furnished as evidence by the plaintiff in error to the court below, the Lehigh Valley Railroad Company considered this transportation, so far as it was concerned, only transportation from Mauch Chunk to Phillipsburg. In its traffic arrangements with the other companies this consideration is carried out and it receives its share for transportation only within the state. We contend that the character of this transportation

was a fact to be considered by the court below, and for this purpose this evidence was submitted. Taking the return of the company and the evidence together, the receipts were wholly for transportation within the state. The receipts for the company in this case not determined by the commonwealth on a mileage basis, or by any calculation involving the lines of other railroads, but they are furnished by the company itself. The amounts are determined independent of the other companies and even independent of any other state than Pennsylvania. What returns the Pennsylvania railroad made to the State of New Jersey we do not know, but it is fair to presume that it dealt fairly with that state in return for the rights and protection granted it.

We say then the nature of this transportation was a fact to be determined by the court below and it was so determined and the fact found as follows (see first clause of first paragraph on page 5 of plaintiff in error's paper book):

"So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburg, New Jersey, and the receipts named were for that particular transportation."

No exception was taken to the finding of the court below and we therefore submit that this finding is conclusive and the nature of this transportation is determined to be within the state.

It cannot be doubted that the plaintiff in error could make any arrangement with the other companies for this transportation and maintain its character as intrastate transportation, and its treasurer could make his return and affidavit accordingly, which he did.

For this company to have done anything else would have been unfair to the state that gave it birth and that is now protecting it.

We think it legitimate for this court to take into view the location of the system of roads owned and controlled by the Lehigh Valley Railroad Company and its connection at Mauch Chunk, or Bethlehem on its main line, with a shorter and more direct route to Philadelphia wholly within the state. It had this connection with the Philadelphia and Reading railroad and used it for its passenger traffic. Because it made an arrangement with the Pennsylvania railroad for its freight traffic by a longer and more circuitous route that took it along the edge of New Jersey

should not be permitted to change the character of the transportation and relieve it from its just share of taxation to the State of Pennsylvania. We submit then that by its report, in connection with all the facts and circumstances of the case, the transportation upon which the tax is based is within the state, and this should affirm the judgment as given by the Supreme Court of Pennsylvania.

II.

The transportation in these cases between Mauch Chunk and Philadelphia, which, in its circuitous route, passes through a portion of New Jersey, is not interstate commerce within the meaning of the commerce clause of the Constitution of the United States.

In every step in these cases the common pleas court of Dauphin county as well as the Supreme Court of Pennsylvania denied the right of the state to tax the plaintiff in error for receipts for transportation from points in a foreign state to other points in the same state after passing through the State of Pennsylvania; or from transportation from points in other states to points in Pennsylvania; or from points in Pennsylvania to points in other states; or from points in a foreign state through Pennsylvania and ending a third state; or from points in foreign states to points in foreign states not touching Pennsylvania. We contend that this is all that could be claimed by the plaintiff in error. The decisions of the United States Supreme Court have never gone further. It may be answered that the question that has arisen in this case has never been considered nor decided by the United States Supreme Court as precisely such a case has never been before it. The mere fact that this company selects a longer and more circuitous route to transport its freight as in this case, should go far toward deciding the case against it. If it voluntarily takes this route to evade taxation it should weigh against it in determining the character of the transportation in this controversy. The claim of Pennsylvania in this case does not in any way effect the State of New Jersey, as under all the facts its territory is not invaded by the plaintiff in error. And further, by the traffic arrangement, so far as the plaintiff in error is concerned, the transportation is wholly in Pennsylvania. The Pennsylvania Railroad Company is not in any way concerned,

and we do not understand that it is in any way complaining. So if this is to be determined as a regulation of commerce with and among the several states, then by the selection of this circuitous route the entire output of anthracite coal destined for Philadelphia can be shipped there, and the State of Pennsylvania be deprived from any revenues by taxation from the railroad companies transporting the same. Under the facts in these cases the tax imposed upon the receipts of this company does not affect the State of New Jersey, nor does it interfere with plaintiff in error in transporting its freight and passengers and does not conflict with either the spirit or letter of the commerce clause of the Constitution of the United States.

In addition to what has already been said in support of this proposition we add the argument made by the commonwealth, when two of these cases were before the Supreme Court of Pennsylvania.

The question in these cases, which do not differ in their material facts, is whether transportation from point to point within a state, which passes the boundaries of the state in transit, is interstate commerce within the meaning of the commerce clause of the Constitution of the United States. This question was before this court last year and was considered and determined favorably to the commonwealth. The cases in which it arose were those of the Lehigh Valley Railroad Company *v.* Commonwealth, Nos. 24 and 25, May term, 1888 (not officially reported, see 22 W. N. C., p. 525).

In No. 24, the railroad company, plaintiff in error, presented the question by the following assignment:

"1. The court erred in overruling the first exception filed by the defendant, which was as follows:

"'The court erred in including in the judgment in favor of the commonwealth, the tax upon $207,660.42, receipts for transportation from freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the state and in again in course of transit.'"

In No. 25, the same plaintiff in error presented the same question by the following assignment of error:

"2. The court erred in overruling the first exception filed by the defendant, which was as following:

"'The court erred in including in the judgment in favor of the

commonwealth, a tax upon $201,630.65, received for transportation of freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the state and in again in course of transit.'"

In each case two other assignments of error, in substantially the same terms, presenting the same question in other language, were filed.

These assignments were based in each case upon substantially the same facts, and the facts were presented by the plaintiff in error upon page sixteen of the paper book in each case, thus:

"As shown by the evidence, the Lehigh Valley Railroad Company has no railroad of its own reaching the city of Philadelphia, but transports coal and other merchandise, and sometimes passengers, from Mauch Chunk and other points in Pennsylvania over its own line to Phillipsburg in the State of New Jersey, from which point it is carried upon the Belvidere and Delaware railroad to Trenton, and thence by the Pennsylvania lines to the city of Philadelphia. So far as the Lehigh Valley railroad line is concerned, the transportation is from Mauch Chunk or other points in Pennsylvania to Phillipsburgh in New Jersey, but by arrangements between this company and the corporations owning the other roads, the transportation is continuous from Mauch Chunk and points in Pennsylvania to Philadelphia * * * some of the trains, and in many instances the same cars, which carried the freight and passengers indicated between points in Pennsylvania and the city of Philadelphia, carry, also, freight and passengers destined and carried from points in Pennsylvania to points in New Jersey and New York, and *vice versa*."

Upon these facts the question was stated in the same form in each of said cases and substantially in these words. (Plaintiff's paper book, No. 24, p. 18; No. 25, p. 17):

"It was from this transportation that the item of $201,630.65 was derived. It is approximately correct to say that about one-half of the distance from Mauch Chunk to Philadelphia is in Pennsylvania, and the other half is in New Jersey. Is such transportation insterstate commerce or is it not? That is the question to be determined."

The opinion of the court in those cases covered others also, and was as follows:

"We have examined with care the opinion of the learned judge, who decided the above stated cases in the court below, and we are satisfied that the conclusions reached by him are correct. Nor do we deem it advisable to attempt to add anything to what he has so well said."

"The judgments are severally affirmed."

It would seem, therefore, that the question, as now before the court, was concluded by the decision of last year, and that the present writs have no other object than a more complete presentation of the case of the plaintiff in error for purposes of ultimate review by the Supreme Court of the United States.

It only remains to add, as a matter of convenient reference, the argument made last year upon the same question, which was as follows:

It is claimed that the portion of the judgments represented by the tax upon the item of $207,660.42 in No. 24, and the item of $201,630.65 in No. 25, was imposed upon what is to be regarded as interstate commerce.

It is conceded by the other side that the taxes imposed upon the business of the corporation defendant, represented by its transportation wholly within the state, is valid. There is no difficulty, therefore, in the fact that there is anything in the nature of the business, or that it is transacted in connection with interstate business, that makes the tax objectionable. The tax is valid upon all the business of the corporation, except so far as the Federal Constitution steps in and declares that that part of it which is interstate commerce shall not be taxed. The language of the provision of the Federal Constitution on this subject is: "The congress shall have power * * * to regulate *commerce* with foreign nations and *among* the several states and with the Indian tribes."

Commerce is not simply transportation. There is involved in it exchange and interchange, and it has relation to the points and persons from and to which, or between which, the interchange is effected. Transportation is an important element in the movement or operation. There is more involved in the transaction than the mere conveyance by a person for himself at his own convenience of his property from one point to another. This idea is borne out by the definitions contained in the paper book of the other side, and we quote them here as supporting the above views:

"Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in *buying from one nation* and *selling to another*, or in transporting

the merchandise *from* the *seller* to the *buyer* to gain the *freight*." Passenger Cases, 7 Howard, 416.

"Probably the transportation of articles of trade *from one state to another* was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states, a power to prevent embarrassing restrictions by any state was the thing desired." Cases of the Freight State Tax, 15 Wallace, 275.

"The *bringing* of goods *from* the *seller* to the *buyer* is commerce." Ibid, 275.

"The carriage of passengers or freight between different points is commerce." Fargo *v.* Michigan, 121 U. S. 230, 347.

"Both companies (telegraph and railroad) are instruments of commerce and their *business* is commerce itself." Telegraph Co. *v.* Texas, 105 U. S. 460, 461.

From the foregoing principles, if carefully considered, it may be deduced, that there is involved in the idea of commerce, not only the mere movement, but the relations of the termini thereof and the purpose contemplated. Commerce is either interstate or not interstate, according as this movement proceeds from one state to another or from one point to another within the state. Granting that transportation merely be commerce, the character of that transportation is to be determined by the conditions of the completed act. Transportation from a point in one state to a point in another is transportation between the states. Transportation from a point within a state to a destined ultimate point within the same state, whether the line of transportation pass many miles or a fraction of a mile through the territory of some other state, cannot be transportation among or between states. The significance of the phrase "among the states," has relation to the interchange and transportation of goods and persons from one state to another. The points of origin and destination furnish the test.

In Telegraph Company *v.* Texas, *supra,* it was decided that intercourse by a telegraph company between the states was interstate commerce. The court in that case say: "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself.

The message passes at once from the control of the sender and instantaneously reaches the point to which it is sent. We may

suppose the case of a telegraph line, with its terminal points in the same state, located near the boundary of such state, and passing, by reason of slight curve in its boundary, whether that boundary be a stream or a line, but a few rods through the territory of another state.

Will it be said that the message sent from one end of the line to the other shall be treated as interstate commerce? By a slight detour it would be possible for the telegraph company, so situated, to escape entirely from the taxing power of the state, under such construction of the constitution, while a line between the same points, lying wholly within the state, would be subject to state taxation.

We may, in this connection, suppose the case of another competing telegraph line between the same points, avoiding, either by a straightening or a slight detour in its line, passage across the territory of the other state, as assumed in the first case, and yet its business, confessedly not interstate commerce, would be subject to the taxing power. Precisely the same business between the same points in the same state, in one case, by the mere accidental circumstance of the line passing but a few rods or a few feet over the territory of another state, would be treated as interstate commerce, exempt from taxation, and in the other, subject to its full burden.

As another instance of the result of the doctrine contended for on the other side, we might suggest (as was suggested in the oral argument below), the case of the Erie railway and New York Central railroad as to their traffic between New York and Buffalo. In the case of the Erie it passes out of the state and in again through the State of Pennsylvania. As to these two points, the New York Central is entirely within the State of New York. In the former case, under the doctrine contended for on the other side, the same business between the same points would entirely escape state taxation, whereas in the other it would be subject thereto. The momentous consequences of such a view must be sufficiently evident to the court without further discussion.

The case of Coe *v.* Errol, 116 U. S. 517, is not authority for the present case. It does not present the same conditions. The opinion of the court below on this subject may be here quoted as expressing fully the reasoning on this subject.

"A new question arises here, however, which needs a short consideration. It is argued that the sum of $16,450.13 received for transportation by continuous carriage between points both of which are in Pennsylvania, cannot be taxed because, during the transit, the goods and passengers were carried out of the state and in again. This, it was argued, makes the whole carriage interstate commerce, and we were referred to several cases in support of the argument. None of them goes at length. In Coe *v.* Errol, 116 U. S. 517, the court remarks, in discussing another question, that New Hampshire could not tax logs which were started in Maine destined for another point in the same state, were floated down the Androscoggin river into New Hampshire, and were there temporarily detained. Treating this as a decision, however—and we do not deny its correctness—it is not in point. If the court had decided that *Maine* could not tax the logs because they had passed through New Hampshire, the case would be like the one before us. Lord *v.* S. S. Co., 102 U. S. 541, simply holds that a steamship plying upon the Pacific ocean between two ports of California was engaged in commerce with foreign nations so as to be subject to the regulating power of congress; the reason being, that she was navigating the high seas, on the common highway of nations, where the United States was responsible for her conduct and owed her protection. The question of California's power to tax the steamship's receipts was in no way involved or considered.

"In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance, the commerce here is purely internal, whatever the mere form of it may be; the freight and passengers start from a point in Pennsylvania, destined for another point in Pennsylvania, and are carried to their destination by continuous transit. Does this become interstate commerce merely because the railroad curves for a few miles into another state, and then curves back into Pennsylvania? If it does, we reach the somewhat surprising conclusion that the State of New York cannot tax the defendant's receipts for transportation between the cities of New York and Buffalo, simply because the cars are hauled over a few miles of rails within the State of Pennsylvania; and also that merely to cross the Delaware river and then cross back a mile or two beyond would make any railroad corporation of Pennsylvania or New Jersey an interstate carrier as to all traffic which passed over the two bridges. So, too, the receipts of a steamboat plying between two ports in the State of Ohio along the Ohio river would be free from taxation by that state if the channel carried her for a few moments only into the State of Kentucky. We do not believe this to be the law, and accordingly hold that the de-

fendant is taxable upon the item of $16,456.13 above named, as being receipts from internal commerce only."

In addition to what the court below has already so well said in regard to the case of Ceo *v.* Erroll, we desire to emphasize the fact that the point which is quoted in the argument of our adversary as part of the syllabus, was not a question discussed or involved before the Supreme Court of the United States. The only question was the right of the State of New Hampshire to tax logs which had been cut in the State of New Hampshire, and which were intended ultimately to be shipped to a point in the State of Maine. The attention of the court was not called to the point in question, and whatever may have been said by the way was mere dictum in no respect necessary to a proper decision.

We therefore submit that as to this point the judgment must be sustained.

This dicta in the cases cited upon the other side do not bear out all that is claimed. In the case of Lord *v.* Steamship Co., 102 U. S. 541, the decision of the court was based upon the idea that in navigating the high seas the vessels, although plying between ports in the same state, was engaged in navigating the highway common to all nations, the question being with reference to the application of an act of congress regulating the liability of owners of vessels while on the seas, the common highway of nations. The court say:

"The Pacific ocean belongs to no one nation, but is the common property of all. When, therefore, the 'Ventura' went out from San Francisco to San Diego on her several voyages she entered on a *navigation* which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If, in her navigation, she inflicted any wrong on another country, the United States, and not the State of California, must answer for what was done."

It was in this sense that the vessel was considered as engaged in commerce, and under such circumstances, by reason of the relation of the vessel to the protecting government, and the highway on which it plied, it came within the scope of the jurisdic-

tion of the general government, because that government only had the power of police and regulation in common with other nations, over those who sailed within the limits of that jurisdiction.

III

The consequences of the doctrine contended for by counsel on the other side are well stated by the court below in its opinion. It cannot be supposed that the Federal Constitution, in conferring the regulating power upon congress, intended anything more than to bestow upon it the power regulating commercial transactions between the state or between the people thereof, and it cannot be possible that a deviation into another state in the line of transportation between points or persons in the same state, however trifling that deviation might be, would bring it within the scope of the constitutional provision.

In the case of State *et al. v.* Chicago, St. P., M. & O. Ry. Co., 40 Minn. 267, cited by plaintiff in error, we quote from this decision a portion of the paragraph immediately preceding the portion printed by plaintiff in error. It is as follows:

"There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this state, but whose route incidentally at some point, and for an inconsiderable distance, should cross the line of the state, whether or not the transportation in such a case might be deemed to be substantially domestic and not embracing an important element of foreign transit we do not decide. This is not such a case. This line within Wisconsin, to which this order is applicable, was operated not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the State of Wisconsin."

We submit then that this case does not cover these cases in controversy, but the transportation here contended for is "substantially domestic" and comes within the point not decided in that case, and the gross receipts therefor are liable to taxation in this state.

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